

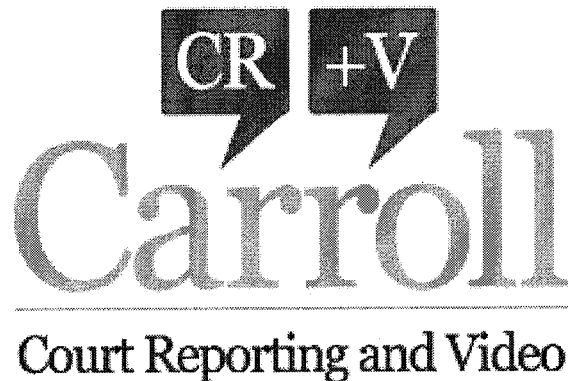
EXHIBIT 34

In The Matter Of:

The Pond Guy v. Aquascape Designs

Douglas Bania

March 28, 2014



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE POND GUY, INC., a Michigan
corporation, and JASON G. BLAKE,
d/b/a The Pond Guy, a Michigan resident,

Plaintiffs:

-vs-

No. 2:13-cv-13229-NGE-DRG

AQUASCAPE DESIGNS, INC., an
Illinois corporation, and GREGORY G.
WITTSTOCK, an Illinois resident,

Defendants:

_____ /

The Deposition of DOUGLAS BANIA,
taken before Ann Marie Myers-Boothe, a Certified
Shorthand Reporter in and for the County of Macomb,
State of Michigan, in the offices of DYKEMA GOSSETT,
PLLC, 400 Renaissance Center, 23rd Floor, Detroit,
Michigan, on Friday, the 28th Day of March, 2014, at
9:00 a.m.

APPEARANCES:

KERR RUSSELL & WEBER, PLC,
Attorneys at Law
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226

BY: JACQUELYN A. KLIMA, ESQ.

Appearing on behalf of the Plaintiffs:

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<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES (continued): 2 3 DYKEMA GOSSETT, PLLC, 4 Attorneys at Law 5 400 Renaissance Center 6 Detroit, Michigan 48243 7 BY: ALLAN GABRIEL, ESQ. 8 DAVID J. BRESSLER, ESQ. 9 Appearing on behalf of the Defendants: 10 ALSO PRESENT: Jason G. Blake 11 Jeff Payton 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 Detroit, Michigan 2 Friday, March 28, 2014 3 9:00 a.m. 4 5 6 *** *** *** 7 8 DOUGLAS BANIA 9 10 Being first duly sworn to tell the truth, the 11 whole truth, and nothing but the truth, testified 12 as follows: 13 14 (WHEREUPON DEPOSITION EXHIBIT 5 15 MARKED BY THE COURT REPORTER) 16 17 EXAMINATION 18 BY MR. GABRIEL: 19 Q Could you state your full name for the record. 20 A Douglas Bania. 21 Q Mr. Bania, my name is Allan Gabriel. I represent 22 Aquascape Designs, Inc. and Gregory W. Wittstock in 23 the lawsuit where the plaintiff is The Pond Guy, 24 Inc. and Jason G. Blake. That lawsuit is presently 25 pending here in Michigan.</p>
<p style="text-align: right;">Page 3</p> <p>1 INDEX 2 3 WITNESS: DOUGLAS BANIA 4 EXAMINATION BY MR. GABRIEL 4 5 EXAMINATION BY MS. KLIMA 102 6 RE-EXAMINATION BY MR. GABRIEL 103 7 8 9 EXHIBITS 10 DEPOSITION EXHIBIT 5 4 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 I understand you have been 2 retained as an expert to present opinions in this 3 matter, is that correct? 4 A Correct. 5 Q I take it you have been deposed before? 6 A Yes. 7 Q Do you feel it is necessary for me to go through 8 the explanation of how a deposition operates in 9 terms of questions and answers, objections, that 10 general information? I'm happy to do it. 11 A No, that's fine. 12 Q The one thing I would ask you is -- and this is an 13 admonition to myself as well -- try to speak 14 clearly and loud enough for the court reporter to 15 transcribe what you say. 16 Even though I know many times 17 you will anticipate where the question is going, 18 let me finish the question and then you can start 19 your answer. If not, the transcript will have 20 interruptions all over the place. 21 You understand all of that, 22 correct. 23 A Understood. 24 Q Finally, it's not my intention to mislead you or 25 confuse you. So if you don't understand my</p>

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<p style="text-align: right;">Page 6</p> <p>1 question, let me know. I think we all have a joint 2 interest in your best testimony and precision so 3 the record is clear. 4 You understand all that, 5 Mr. Bania? 6 A Yes. 7 Q Let's go into a little bit of your background here, 8 please. 9 First of all, the reporter has 10 marked as Exhibit 5 a document I am passing over to 11 you. 12 Can you look at it and tell me 13 what that document is? 14 A Yes. This is the expert report that I submitted on 15 March 14, 2014. 16 Q Within the report are your opinions, information 17 about you, back up for your opinions. And this is 18 the only report that you have prepared in 19 connection with this case, is that correct? 20 A Yes. 21 Q All right. In one of the pages -- and I don't 22 think the pages are numbered, are they? 23 A Upper left. 24 Q That's why I can't find it. 25 Turn to the page that lists</p>	<p style="text-align: right;">Page 8</p> <p>1 there. 2 A Correct. I am just making sure you are correct. 3 And yes, you are correct. 4 Q Both of those are dated 2013. So can you tell me a 5 little about the Rawlings Sporting Goods Company 6 versus Wilson Sporting Goods Company and what the 7 trademark issues were in that case? 8 A Yes. I was working for Rawlings. And Wilson was 9 misusing one of their trademarks. 10 Q What trademark? 11 A I don't know if I can get into the details of that, 12 but it was a trademark that was owned by Rawlings 13 Sporting Goods Company. 14 Q There was an infringement claim in that case? 15 A Yes. 16 Q What was the subject matter of your opinion; what 17 were you rendering your opinion on? 18 A I was rendering opinion on damages. 19 Q So your analysis in trademark infringement case 20 involving Rawlings and Wilson related to coming up 21 with an expert report opinion as to the amount of 22 damages? 23 A That's correct. 24 Q All right. In connection with the work you did on 25 that case, did any of the work you did in</p>
<p style="text-align: right;">Page 7</p> <p>1 your experience, please. 2 A Page 35. 3 Q Perfect. 35 is your listing of category that you 4 call Expert Witness Experience. And what is 5 contained within that list? 6 A These are projects that I was hired and named the 7 expert on. 8 Q They include in this list those that you did a 9 report in, those where you testified in a 10 deposition, is that correct? 11 A Yes. 12 Q And in any of these matters did you testify at 13 trial? 14 A No. 15 Q Let me just take several of them and ask you some 16 questions about them. 17 First of all, can you tell me 18 which ones involve trademarks? 19 A The Rawlings Sporting Goods. The Rebel Media, No 20 Good Entertainment. That's it. 21 Q With respect to the two that you identified, in 22 each one of those you drafted and provided expert 23 opinion but were not deposed and did not testify at 24 trial, is that correct? 25 I'm just reading what it says</p>	<p style="text-align: right;">Page 9</p> <p>1 calculating damages relate to any issue having to 2 do with the Internet? 3 A Yes, it did. 4 Q In what manner? 5 A The use of -- the misuse of the alleged misuse of 6 the trademark was used on field, but it was also 7 used in social media and on the Internet. 8 Q In that case did your opinion insofar as it related 9 to an amount of damage take into account anything 10 having to do with the use of the trademark on the 11 Internet? 12 A Yes, it did. 13 Q In what fashion? 14 A It just used -- the alleged misuse, I was 15 calculating the impressions and the amount of 16 misuse on the Internet. 17 Q Did you translate that into lost sales of the 18 plaintiff or lost opportunities; how did it relate 19 to the damage analysis you did? 20 A This case did settle, so I was not deposed. And 21 don't even know if a final report was ever 22 delivered. So I can't get into all the details of 23 the specifics of my opinion and the approach to 24 calculating damages. I don't know if I'm allowed 25 to do so.</p>

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<p style="text-align: right;">Page 10</p> <p>1 Q Let me clarify. 2 Did you submit an expert 3 report in that case? 4 A I did not. 5 Q When you list the fact that you list as an expert 6 opinion something you did in the Rawlings Sporting 7 Goods Company versus Wilson Sporting Goods Case, 8 you did some work, some analysis, but you never 9 finalized nor submitted an expert report, is that 10 correct? 11 A That's correct. 12 Q What you testified to earlier about taking into 13 consideration impressions is something you were 14 doing while you were considering preparing the 15 ultimate report which never was actually produced, 16 is that right? 17 A That's correct. I was the named expert on the 18 project working on the report, working with the 19 attorneys. It settled before the report was due. 20 Q Rubble Media versus No Goods Digital. What was the 21 trade -- strike that. 22 Did you submit a completed 23 report that was provided to the other side in that 24 case? 25 A No.</p>	<p style="text-align: right;">Page 12</p> <p>1 side. So I don't know for a fact. 2 Q So we just talked about the two cases you 3 identified as trademark cases. Let me ask about 4 the others you have listed here on page 35. 5 In any of them, did you render 6 an opinion that analyzed issues relating to the 7 Internet at all? 8 A Yes. 9 Q Which ones? 10 A The Julia Child Foundation case is a rights of 11 publicity case. It was an alleged misuse of Julia 12 Child's name and likeness in an advertising 13 campaign and on a blog and on facebook and 14 throughout the Internet. 15 Q Any other one? 16 A David Wolfe versus Sunfood is a rights of publicity 17 case. This was a misuse of name and likeness on 18 product packaging but also Internet sales. 19 Q Any other one? 20 A Brady versus Waxie is a copyright infringement case 21 that dealt strictly with the Internet. 22 Q Keep going. I want to get the list. 23 A That's it. 24 Q So let's take the Julia Child case. 25 Did you submit a completed</p>
<p style="text-align: right;">Page 11</p> <p>1 Q What was the trademark at issue? And I am only 2 asking to the extent it was in the pleadings filed 3 in court. Presumably there was something in court. 4 I don't want you to reveal confidential information 5 related to your work. 6 A This was related to a YouTube channel. It was a 7 dispute over the name of the channel. 8 Q What was the name of the channel? 9 A The name of the channel -- I'm not sure how much, 10 because this again is confidential. I did not 11 submit a report. 12 Q You didn't render any opinions in connection with 13 that case, is that correct? 14 A I worked with the attorneys. And again, before the 15 report was due, the case settled. 16 Q No opinions were provided to the other side in that 17 case, right? 18 A I don't know that. I don't know. 19 Q So you don't know if your expert report was 20 completed? 21 A I know my report wasn't completed. I don't know if 22 my attorney while negotiating the deal used the 23 fact that they hired me, the information that I 24 provided to help them settle the case. I don't 25 want to assume that that was voiced to the other</p>	<p style="text-align: right;">Page 13</p> <p>1 expert report that was provided to the other side 2 in that case? 3 A Yes. That's state court, so it wasn't a Rule 26 4 report. But I provided -- for my deposition I did 5 provide a written Power Point presentation. 6 Q The Julia Child case is listed as a district court 7 case. That is what I am asking you about. Is that 8 incorrect? 9 A I don't know if that is incorrect. My memory of 10 the deposition in the final work product wasn't a 11 typical Rule 26 style report. I don't know if that 12 was a decision of the attorney or I could have 13 misstated it here. 14 But I did submit a report, as 15 far as I remember. I don't remember it being a 16 Rule 26 report. 17 Q You were deposed in that case? 18 A That's correct. 19 Q And who was the lawyer for the plaintiff in that 20 case? 21 A The lawyer for the plaintiff in the case -- I was 22 working for the defendant, DGWD Advertising, from 23 the Sedjuwick (Phonetics) firm. And the 24 plaintiff's attorney, I don't recall. 25 Q So can you describe the nature of the work you did</p>

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<p>1 in the Julia Child case, the right of publicity 2 case on behalf of the defendant? What was the 3 nature of the opinions you rendered? 4 A As much as publicly available, the ultimate client 5 was Thermador. Thermador makes major appliances, 6 you know. 7 Thermador used Ms. Child's 8 name and likeness in a historical perspective. 9 Used her image and used her actual name in some 10 blogging and some advertising on the Internet and 11 some social media. 12 And I was hired to calculate 13 the fair value for using that, the name and 14 likeness in those various ways. 15 Q You were looking for some incremental value 16 attributable to the use of her name, image and 17 likeness in some advertising and promotions done by 18 the defendant? 19 A How do you define incremental value? 20 Q Tell me the methodology you used that involved the 21 Internet in connection with that issue. 22 A I don't know if I can share that with you. 23 Q Why not? 24 A I don't know if I could share a report that is not 25 publicly available.</p>	<p>1 Q Didn't you look at other license personalities to 2 come up with some bench marks? 3 A I did. 4 Q And you use that approach to come up with an amount 5 that would theoretically compensate the plaintiff 6 for its use based upon analogous situations where 7 rights of publicity had been licensed? 8 A My market approach and my comparables showed how it 9 was not similar. So I did not use that approach. 10 Q When you say you showed it was not similar, it was 11 worth less than -- 12 A I can't reveal the worth. 13 Q Did you do any analysis of the impact of the use of 14 Julia Child's image and likeness in sales? 15 A I did not. 16 Q So you were coming up with a value for her right of 17 publicity, is that correct? 18 A For her right of publicity used in this way. 19 Q And that analysis was not an analysis of the impact 20 of the use of her name, image and likeness on the 21 Internet; you didn't do that analysis, right? 22 A Repeat that. 23 Q The analysis that you did did not involve reviewing 24 all uses of Julia Child on the Internet by the 25 defendant and coming up with some analysis of what</p>
Page 15	Page 17
<p>1 Q All right. And was that report produced in that 2 case? 3 A As far as I know, yes. 4 Q What is the conclusion that you reached? 5 A I came up with the economic benefit that Thermador 6 received from the use of the name and likeness in 7 the various ways. 8 Q What type of analysis did you use to quantify the 9 impact of any Internet activity undertaken by the 10 plaintiff? 11 A A general answer is using the market approach. 12 Q What do you mean by that? 13 A The market approach, just like in real estate, what 14 does similar assets sell for or license for in this 15 case? 16 So I was hired to build a 17 hypothetical license in which Thermador was a 18 willing buyer and Julia Child was a willing seller. 19 So try to think of that as fair market value. You 20 have a willing buyer, willing seller. Typically in 21 the litigation context it is more of a fair value, 22 because it's a forced transaction. 23 Q You did some reasonable royalty hypothetical 24 negotiation approach, is that correct? 25 A No.</p>	<p>1 value that had to the plaintiff? 2 A I exactly did that. 3 Q You looked at the use on the Internet to come up 4 with what the fair license value would be? 5 A That's correct. 6 Q What kind of metrics did you look at? 7 A You know, I had access to the use. So I had access 8 to the Google Analytics and how it was used, the 9 traffic. I had access to the back end of facebook 10 to understand how many people looked at it, liked 11 it, shared it. 12 So it was more of an Internet 13 base use, which is not typically written in a 14 license agreement. 15 Q So you came up with a valuation based upon Internet 16 use, as opposed to a comparative valuation of what 17 is the value of other celebrities' images and the 18 licensed value of other circumstances; is that a 19 fair statement? 20 A Yes. 21 Q And there was no trademark claim in that case, 22 right? 23 A I don't know. I was not asked to look at 24 trademark. 25 Q You opined only in connection with the damage</p>

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<p>1 analysis related to right of publicity in that 2 case, right? 3 A Yes. 4 Q I think you said David Wolfe versus Sunfood -- by 5 the way, when you say 2013, what does that mean? 6 That you issued the report in 2013; were deposed in 7 2013? 8 A I was hired in 2013. 9 Q The David Wolfe case is another one. That is 10 Superior Court in San Diego. 11 You said it was a right of 12 publicity case. Whose right of publicity? 13 A David Wolfe's. 14 Q Who is David Wolfe? 15 A He is a raw food person. 16 Q Which side did you provide an expert report for in 17 that case? 18 A Sunfood. 19 Q The defendant, which was, I take it, accused of 20 misappropriating the right of publicity of 21 Mr. Wolfe, is that correct? 22 A Yes. 23 Q What type of analysis did you do in that case? 24 A That analysis I did look at unjust enrichment for 25 my client, Sunfood. I did not look at lost profits</p>	<p>1 use was at issue in that case, right? 2 A Yes. 3 Q My question is did you actually come up with a 4 number, whether it was zero or something else, was 5 that part of your opinion? 6 A Yes. 7 Q I am juxtaposing that with here; you are not 8 opposing a number in this report, right? 9 A Yes. 10 Q I think the other you identified as having 11 something to do with the Internet was Brady. You 12 said that was a copyright infringement case? 13 A Yes. 14 Q What was the copyright infringement claim with 15 Brady? 16 A The claim was that my client, Brady, used some of 17 Waxie's copyrighted marketing material on their 18 website. 19 Q What type of marketing material? I assume in some 20 pleading in this case that the answer to that 21 question appears. If you think it didn't and you 22 believe you can't answer it, then you won't answer 23 it. 24 My question is what type of 25 material?</p>
Page 19	Page 21
<p>1 for Mr. Wolfe because I did not have access to the 2 financials. 3 Again, because it was Internet 4 related as well, I had to look at the various ways 5 that it was used on the Internet. So not only 6 David Wolfe's name and likeness on product 7 packaging, but the use on the website. 8 Q Did you come up with a damages opinion with an 9 actual number in that case? 10 A I came up with a damages opinion, yes. 11 Q That took into account -- strike that. 12 Your amount was related to the 13 allegation that the defendant was unjustly 14 enriched; and you opined on that amount, is that 15 correct? 16 A I didn't say my opinion said that my client was 17 unjustly enriched. I took that approach to 18 determine whether that was true or not. 19 Q When you say you took that approach, you were 20 analyzing that issue, is that correct? 21 A That's correct. 22 Q You were coming up with a number, whether it was 23 zero or anything else, that related to an opinion 24 about to what extent, if any, your client was 25 unjustly enriched as a result of the use, whatever</p>	<p>1 A It was marketing material. It was part of Waxie's 2 product catalog. Allegedly Brady took some of that 3 copyrighted material and posted it on their 4 website. 5 Q Was it photographs or text? 6 A Text. 7 Q And what was the nature of the opinion that you 8 rendered in that case; what were you opining on? 9 A I was opining on damages. 10 Q And in connection with that, you made some 11 assumption that there was liability for purposes of 12 your calculation, is that correct? 13 A I don't understand. 14 Q You didn't opine on liability, did you? 15 A That's a legal opinion? 16 Q Right. You didn't do that? 17 A Absolutely not. 18 Q You were opining on damages in the sense that in 19 the event there was a finding of liability, you 20 were offering an opinion as to what, if any, 21 damages there were, right? 22 A Yes. 23 Q And in connection with that issue, were you opining 24 on statutory damages or lost profits; what was the 25 nature of your analysis?</p>

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<p>1 A I was in this case looking for unjust enrichment.</p> <p>2 Q And that would be the benefit to the defendant, if</p> <p>3 any, in connection with the alleged activity, is</p> <p>4 that what you mean?</p> <p>5 A Yes.</p> <p>6 Q And what did that analysis have to do with the</p> <p>7 Internet in terms of coming up with your opinions</p> <p>8 in that case?</p> <p>9 A Because the alleged copyright infringement was used</p> <p>10 online, therefore, I needed to make a connection</p> <p>11 between the alleged copyrights that were used</p> <p>12 online and sales.</p> <p>13 Q And so you rendered an opinion making that</p> <p>14 connection?</p> <p>15 A I am not saying there was a connection. But I</p> <p>16 analyzed that situation.</p> <p>17 Q So what is the status of that case today?</p> <p>18 A I believe that case is still going.</p> <p>19 Q You submitted a report that went to the other side</p> <p>20 in that case, is that correct?</p> <p>21 A That's correct.</p> <p>22 Q Are you aware of any proceedings in that case where</p> <p>23 any of what you said in your report wound up in any</p> <p>24 pleading filed in that case?</p> <p>25 A I don't know.</p>	<p>1 situations.</p> <p>2 An attorney has a client that</p> <p>3 they are thinking about filing a Complaint for</p> <p>4 damages. And I assist with that process.</p> <p>5 Q In terms of getting to the point of an expert</p> <p>6 report -- I'm probing this and this only goes back</p> <p>7 a certain period of time -- were there are any</p> <p>8 others?</p> <p>9 A No, there's not.</p> <p>10 Q Sorry. I should have made that clear so you didn't</p> <p>11 have to search your memory.</p> <p>12 Let me ask you this. Have you</p> <p>13 ever testified at trial in connection with any</p> <p>14 opinion you have rendered as an expert?</p> <p>15 A No.</p> <p>16 Q Let me get into some questions about your sources</p> <p>17 of information.</p> <p>18 Your report lists what you</p> <p>19 relied upon in connection with your preparation</p> <p>20 with your report, is that correct?</p> <p>21 A Correct.</p> <p>22 Q Let me get into that topic for a moment.</p> <p>23 Can you identify the people</p> <p>24 who you understand are employed by or associated</p> <p>25 with The Pond Guy, who you communicated with</p>
Page 23	Page 25
<p>1 Q Was your opinion that the use of the copyrighted</p> <p>2 material on the Internet by the defendant such that</p> <p>3 there was no unjust enrichment?</p> <p>4 A I can't say.</p> <p>5 Q So we have gone through your list on 35. You have</p> <p>6 discussed two cases that involve trademarks. You</p> <p>7 have discussed three cases that involve the</p> <p>8 Internet in terms of the expert opinion that you</p> <p>9 rendered.</p> <p>10 I want to make sure you have</p> <p>11 completed your discussion as to these cases of</p> <p>12 situations where you were rendering an opinion</p> <p>13 where there was a trademark claim at issue or where</p> <p>14 there was an Internet related issue. Are there any</p> <p>15 others?</p> <p>16 A Let me double check.</p> <p>17 Q Okay.</p> <p>18 A That's it.</p> <p>19 Q Other than the experiences listed on this page, are</p> <p>20 there any other situations where you have been</p> <p>21 retained as an expert and did any work at all</p> <p>22 related to trademark claims?</p> <p>23 A There are times where I am hired as a consulting</p> <p>24 expert, maybe not named as an expert, but assist</p> <p>25 attorneys with oftentimes pre-litigation</p>	<p>1 directly in connection with your preparation of</p> <p>2 this report?</p> <p>3 MS. KLIMA: Don't answer if we</p> <p>4 were present during any of the conversations.</p> <p>5 MR. GABRIEL: I'm not sure if</p> <p>6 that makes any of that privileged.</p> <p>7 MS. KLIMA: It absolutely is,</p> <p>8 under the federal rules.</p> <p>9 MR. BRESSLER: There is</p> <p>10 absolutely no --</p> <p>11 MS. KLIMA: After 2010 have</p> <p>12 you not read the -- I'll pull it out.</p> <p>13 MR. BRESSLER: No.</p> <p>14 MR. GABRIEL: We're not asking</p> <p>15 for what you said.</p> <p>16 MS. KLIMA: I'll pull it out.</p> <p>17 MR. GABRIEL: You can't sit in</p> <p>18 a room and shield any facts that the client gives</p> <p>19 to the expert.</p> <p>20 THE WITNESS: Can I take</p> <p>21 a break and grab a tissue?</p> <p>22 MR. GABRIEL: Sure.</p> <p>23 (WHEREUPON A RECESS WAS HAD)</p> <p>24 Q (By Mr. Gabriel continuing): Let me repose the</p> <p>25 question.</p>

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<p>1 Can you tell me the names of</p> <p>2 the people who you understood were employed by or</p> <p>3 affiliated with The Pond Guy with whom you spoke in</p> <p>4 connection with your engagement as an expert?</p> <p>5 A Jason and Joe.</p> <p>6 Q Jason Blake, is that correct?</p> <p>7 A Correct.</p> <p>8 Q And Joe who or whom?</p> <p>9 MR. BLAKE: Meija. M-E-I-J-A.</p> <p>10 MR. GABRIEL: Thank you.</p> <p>11 Q (By Mr. Gabriel continuing): Anyone else?</p> <p>12 A No.</p> <p>13 Q Did you obtain any facts or data in connection with</p> <p>14 your work that you did in rendering this opinion</p> <p>15 from Counsel?</p> <p>16 A Let me clarify one thing.</p> <p>17 My business partner --</p> <p>18 Q I was going to get there, but go ahead. Let's do</p> <p>19 it now.</p> <p>20 A Brian Buss, I believe, talked to Melissa.</p> <p>21 MR. BLAKE: Melissa Palowski</p> <p>22 (Phonetics).</p> <p>23 THE WITNESS: I am not sure if</p> <p>24 he had a conversation with her on the phone or not.</p> <p>25 Q (By Mr. Gabriel continuing): So anyone else that</p>	<p>1 MS. KLIMA: Again, I think</p> <p>2 that's beyond the scope of the rule.</p> <p>3 MR. GABRIEL: I don't think it</p> <p>4 is at all. I think we're entitled to know what</p> <p>5 documents he considered.</p> <p>6 MS. KLIMA: Facts or data that</p> <p>7 the attorneys -- only considered. If there's</p> <p>8 something he didn't consider, I'm saying, that we</p> <p>9 have an objection.</p> <p>10 MR. GABRIEL: I asked a</p> <p>11 specific question. Let me repeat it.</p> <p>12 Q (By Mr. Gabriel continuing): On page 31 of your</p> <p>13 report you title this list, Exhibit A, Documents</p> <p>14 Relied Upon.</p> <p>15 I am simply asking whether you</p> <p>16 recall considering other documents but not relying</p> <p>17 upon them, whether you made that distinction? Some</p> <p>18 experts do and some don't. Do you understand my</p> <p>19 question?</p> <p>20 A Sure. My understanding is these are the documents</p> <p>21 -- the legal documents are the only documents that</p> <p>22 I received from counsel.</p> <p>23 Q Now I am asking you a different question.</p> <p>24 In this entire list, this is</p> <p>25 the list of what you relied upon. It includes a</p>
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<p>1 you know of, either you or the people working with</p> <p>2 you in connection with this report, who</p> <p>3 communicated with someone at The Pond Guy to obtain</p> <p>4 information?</p> <p>5 A That's it.</p> <p>6 Q And what about Counsel, did you communicate with</p> <p>7 Counsel to obtain facts or data related to your</p> <p>8 work on this matter?</p> <p>9 A Yes.</p> <p>10 Q What facts or data did you obtain from Counsel that</p> <p>11 you recall?</p> <p>12 A Facts related to the case. The documents are</p> <p>13 related to, you know, the lawsuit. So the legal</p> <p>14 docs, the Complaint.</p> <p>15 Q The ones listed on the documents you relied upon?</p> <p>16 A That's correct.</p> <p>17 Q Did you review the motion for preliminary</p> <p>18 injunction in this case?</p> <p>19 A Let's take a look. Not that I recall. I don't see</p> <p>20 it listed here.</p> <p>21 Q Let me ask you the question differently.</p> <p>22 Is there some distilling</p> <p>23 factor you applied to the documents you list here</p> <p>24 as ones you relied upon, as opposed to ones you</p> <p>25 looked at but didn't rely upon?</p>	<p>1 number of items that you didn't obtain from legal</p> <p>2 Counsel?</p> <p>3 A Yes.</p> <p>4 Q My question is when you made up this list, were you</p> <p>5 making any distinction between documents you relied</p> <p>6 upon and documents you may have considered but</p> <p>7 didn't rely upon?</p> <p>8 A No, this is the entire list.</p> <p>9 Q Just checking. Understood.</p> <p>10 On the occasions where you</p> <p>11 obtained facts or data from Mr. Blake and</p> <p>12 Mr. Meija, how long did that take and where did</p> <p>13 that happen?</p> <p>14 A I believe that we had an initial conversation with</p> <p>15 them about the case and it was just the facts of</p> <p>16 the case and that was really it.</p> <p>17 Q So it's the case that you had one conversation with</p> <p>18 Mr. Blake to obtain information in connection with</p> <p>19 your rendering of your opinion, is that correct?</p> <p>20 A I don't recall how many conversations I had.</p> <p>21 Q What about Mr. Meija?</p> <p>22 A I don't recall the number of conversations.</p> <p>23 Q You don't recall if you had ten conversations with</p> <p>24 them or one?</p> <p>25 A I don't recall if I had more than one.</p>

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<p>1 Q You have a recollection of at least one, is that 2 correct? 3 A That's correct. 4 Q Where was that conversation? 5 A Where was I? 6 Q Where was the conversation -- on the phone, at 7 their premises? 8 A Yeah, it was on the phone. 9 Q Can you give me an estimate of how long the 10 conversation was? 11 A No. 12 Q Was it more than two hours? 13 A I don't recall. 14 Q Was it more than six hours? 15 A No. 16 Q Less than six hours? 17 A Correct. 18 Q Can you be anymore specific between one minute and 19 six hours as to how long your one conversation that 20 you remember was with Mr. Blake? 21 A I would be guessing. 22 Q I don't want you to guess. 23 At the same time did you speak 24 to Mr. Meija? 25 A He was on the line.</p>	<p>1 how to get access to that information? 2 A I was given access. 3 Q At that time? 4 A Soon thereafter. 5 Q Anything else you recall about facts or data that 6 you obtained during this conversation that you had 7 with Mr. Blake and Mr. Meija? 8 A No. 9 Q It's the case that you didn't have any other 10 communication, e-mail or phone conversation, you 11 personally, with anybody else at The Pond Guy other 12 than what you have testified to, is that right? 13 A Not that I recall. 14 Q You mentioned one of your colleagues. And who is 15 that? 16 A Brian Buss, B-U-S-S. 17 Q What is Brian Buss' position as it relates to your 18 business? 19 A He's a principal. He owns the company with me. 20 Q What involvement did he have in connection with 21 this engagement of you as to render an expert 22 opinion? 23 A You know, he assisted in the administrative aspect 24 of the report. Helping me proofread and things 25 like that.</p>
Page 31	Page 33
<p>1 Q Did you have any separate conversation with 2 Mr. Meija other than that one call that you can 3 testify to? 4 A No. 5 Q During that call I take it you got information from 6 Mr. Blake and Mr. Meija about their business and 7 the claims in this lawsuit and also the activities 8 of Aquascape, is that correct? 9 A We discussed the case. That discussion included 10 his business, Pond Guy's business, Aquascape's 11 business, the use of The Pond Guy by Aquascape. 12 Q Anything else, any other topics where you got facts 13 other than the ones you have identified in this 14 conversation? 15 A During that conversation I believe I received 16 access to Google Analytics. 17 Q Why don't you explain for those who are not 18 participating in this case that may have to 19 understand it at some point when you say access to, 20 what are you talking about? And give us the short 21 version of what Google Analytics is. 22 A The website ThePondGuy.com has a statistical 23 tracking system provided by Google. You can log in 24 and understand who is coming to your site and why. 25 Q You were given access to it, meaning you were told</p>	<p>1 Q And I take it he had at least one communication 2 with someone at The Pond Guy, which you have 3 already mentioned, or are you not sure? 4 A I am not sure. 5 Q What leads you to recall the name Melissa, from 6 what? 7 A There was some data that Melissa provided as it 8 relates to some social media traffic. 9 Q Whose traffic? 10 A Aquascape's. 11 Q Was Brian Buss involved in getting that 12 information? 13 A I believe so, yes. 14 Q What was the information that Melissa provided? 15 A Melissa provided information related to the history 16 and traffic of facebook and twitter accounts for 17 Aquascape. 18 Q What format did she provide that information? 19 A Excel. 20 Q Where is that -- strike that. 21 Did you rely upon that 22 information? 23 A Yes. It's doc 99. 24 Q For doc 99 is there anything else that doc 99 25 describes other than the Excel information provided</p>

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<p>1 by Melissa?</p> <p>2 A No.</p> <p>3 Q What did your company do to verify the information</p> <p>4 that she provided?</p> <p>5 A We looked -- some of the sites, such as facebook,</p> <p>6 you can go back in time. So we went back to see if</p> <p>7 the date in which the page was started and the</p> <p>8 various posts and the numbers were correct.</p> <p>9 Q So I understand you could verify on facebook by</p> <p>10 looking at the very end when the page was started,</p> <p>11 but -- strike that.</p> <p>12 Did you verify all the numbers</p> <p>13 on her spreadsheet?</p> <p>14 A I did not go through every single number on her</p> <p>15 spreadsheet.</p> <p>16 Q Did anyone at your company?</p> <p>17 A I don't know.</p> <p>18 Q So other than date started, what other data was on</p> <p>19 that spreadsheet?</p> <p>20 A You can go back in time on facebook. You could</p> <p>21 pick a year and you could understand in 2010 how</p> <p>22 many posts there were, how many people liked it,</p> <p>23 how many people shared it. It's publicly available</p> <p>24 information.</p> <p>25 Q You can see it or count it up?</p>	<p>1 A No.</p> <p>2 Q Did you get any information about when</p> <p>3 Mr. Wittstock or Aquascape first used the Pond Guy</p> <p>4 in any way on the Internet?</p> <p>5 A When you say did you get, was it given to me are</p> <p>6 you saying?</p> <p>7 Q Yes.</p> <p>8 A No.</p> <p>9 Q Did you ask anyone at The Pond Guy when The Pond</p> <p>10 Guy or any of its representatives first learned</p> <p>11 that Mr. Wittstock was using The Pond Guy in</p> <p>12 connection with his business?</p> <p>13 A No, it was not part of my analysis.</p> <p>14 Q I take it it's not relevant to your analysis,</p> <p>15 right?</p> <p>16 A No.</p> <p>17 Q Did you investigate to what extent the phrase The</p> <p>18 Pond Guy appears on the Internet beyond looking</p> <p>19 into the social media issues that you talk about in</p> <p>20 your report?</p> <p>21 A Can you say it again?</p> <p>22 Q Did you investigate the number of times The Pond</p> <p>23 Guy, that phrase, appears anywhere on the Internet,</p> <p>24 apart from the work you identify when you looked</p> <p>25 into social media and the various social media uses</p>
Page 35	Page 37
<p>1 A That's correct.</p> <p>2 Q I could do the same thing today?</p> <p>3 A That's correct.</p> <p>4 Q You relied upon whatever Melissa put into her</p> <p>5 spreadsheet, and other than checking when the</p> <p>6 facebook page first started for much of the</p> <p>7 information, you assumed her compilation of that</p> <p>8 information was correct?</p> <p>9 A Yes. We looked at each account and we verified</p> <p>10 randomly that the numbers were correct and we're</p> <p>11 comfortable using it in the opinion.</p> <p>12 Q You understood when you did that that she works for</p> <p>13 The Pond Guy, is that right?</p> <p>14 A That's correct.</p> <p>15 Q Have you exhausted the list of people at The Pond</p> <p>16 Guy that you, or people working with you,</p> <p>17 communicated with to get information in connection</p> <p>18 with the report that you prepared?</p> <p>19 A Yes.</p> <p>20 Q Let me ask you some questions about information and</p> <p>21 I would like you to tell me whether you got any</p> <p>22 facts or data related to that.</p> <p>23 Did you get any information</p> <p>24 about when Aquascape or Mr. Wittstock first used</p> <p>25 The Pond Guy for any purpose whatsoever?</p>	<p>1 of both The Pond Guy and Aquascape?</p> <p>2 A No.</p> <p>3 Q Now, you talk a lot about a search engine</p> <p>4 optimization in your report. That is one of the</p> <p>5 underpinnings of your opinion, is that fair,</p> <p>6 meaning your analysis as to what you understand</p> <p>7 Aquascape has done in social media?</p> <p>8 A Yes.</p> <p>9 Q Can you tell me all of the search engine</p> <p>10 optimization steps that have been taken by The Pond</p> <p>11 Guy?</p> <p>12 A No.</p> <p>13 Q Did you ask about any of that?</p> <p>14 A No.</p> <p>15 Q Do you know anything about whether The Pond Guy has</p> <p>16 taken any search optimization steps, search engine</p> <p>17 optimization steps, in connection with its use of</p> <p>18 the three word phrase The Pond Guy?</p> <p>19 A That was not part of my analysis.</p> <p>20 Q Do you think looking into that issue could have an</p> <p>21 impact on anything having to do with the search</p> <p>22 results that you opine about in your report? For</p> <p>23 example, the hierarchy, where Aquascape shows up,</p> <p>24 in first, second or third place? Do you think</p> <p>25 whether The Pond Guy does any search engine</p>

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<p>1 optimization would make any difference?</p> <p>2 A I don't know. I don't have an opinion on that.</p> <p>3 Q Isn't it true that if The Pond Guy took certain</p> <p>4 search optimization steps in connection with that</p> <p>5 phrase on its social media sites, that that would</p> <p>6 have an impact on its appearance in the social</p> <p>7 media and where it shows up in search engine</p> <p>8 results?</p> <p>9 A I did not look -- that was not part of my analysis</p> <p>10 to analyze his SEO techniques.</p> <p>11 Q You are here testifying as an expert, right?</p> <p>12 A Yes.</p> <p>13 Q You rendered an expert opinion of what you</p> <p>14 understand to be the search engine optimization</p> <p>15 steps taken by Aquascape has and will continue to</p> <p>16 have a dramatic impact on search results, right?</p> <p>17 A Correct.</p> <p>18 Q That is your expert opinion based upon all of your</p> <p>19 experience and work in this area and publications</p> <p>20 in the field, is that correct?</p> <p>21 A Correct.</p> <p>22 Q Is it your testimony that while you feel search</p> <p>23 optimization steps and have opined that those steps</p> <p>24 have a dramatic impact on search results for</p> <p>25 Aquascape's use of The Pond Guy, that you cannot</p>	<p>1 Pond Guy in the design, content and optimization of</p> <p>2 its website, which leads to more website traffic</p> <p>3 and potentially increased sales, likely at the</p> <p>4 expense of TPG's website traffic and sales."</p> <p>5 That is one of your opinions</p> <p>6 under your heading Conclusion, is that correct?</p> <p>7 A Yes.</p> <p>8 Q My question is, first of all, can you tell me</p> <p>9 whether The Pond Guy, that company, has been</p> <p>10 strategically been using the phrase The Pond Guy in</p> <p>11 the design, content and optimization of its</p> <p>12 website?</p> <p>13 A No.</p> <p>14 Q Can you tell me why you didn't think that was</p> <p>15 relevant to your analysis?</p> <p>16 A That's not what I was hired to do.</p> <p>17 Q If The Pond Guy increased its activities in</p> <p>18 connection with strategically using the phrase The</p> <p>19 Pond Guy in the design, content and optimization of</p> <p>20 its website, do you agree that that would have the</p> <p>21 affect -- it would lead to more website traffic and</p> <p>22 potentially increase the sales of The Pond Guy?</p> <p>23 A Possibly.</p> <p>24 Q Why only possibly?</p> <p>25 A Because I have not analyzed what they have done.</p>
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<p>1 give any opinion and have no view as to whether</p> <p>2 implementing search engine optimization steps would</p> <p>3 have any impact on the results if they were</p> <p>4 implemented by The Pond Guy?</p> <p>5 A My opinion is search engine optimization techniques</p> <p>6 used properly can have an impact on higher search</p> <p>7 results. I don't have an opinion as it relates to</p> <p>8 The Pond Guy.</p> <p>9 Q So you have rendered an opinion about -- let me ask</p> <p>10 you this.</p> <p>11 It is correct that you have</p> <p>12 rendered an opinion about the impact of the steps</p> <p>13 that you understand Aquascape and Mr. Wittstock to</p> <p>14 have taken to optimize search results, is that</p> <p>15 correct, as part of your opinion?</p> <p>16 A Could you repeat that?</p> <p>17 Q Sure. Let me find what you said to make it easy.</p> <p>18 A Bottom of page 23 possibly.</p> <p>19 Q I'm looking for something a little different. Give</p> <p>20 me a minute.</p> <p>21 Let's start with a broad</p> <p>22 conclusion. Go to page 30.</p> <p>23 A Okay.</p> <p>24 Q In your conclusion, first bullet point, you say,</p> <p>25 "Aquascape is strategically using the phrase The</p>	<p>1 you know, up to this point. I don't know what an</p> <p>2 increase is. I don't have a starting point to</p> <p>3 that.</p> <p>4 Q You don't know -- I think you talk about some of</p> <p>5 the key well-known search engine optimization steps</p> <p>6 in your report? I think that is a phrase you use.</p> <p>7 A Yes.</p> <p>8 Q Do you know what I am talking about, what was the</p> <p>9 phrase you used to describe --</p> <p>10 A Are you talking about the meta data or --</p> <p>11 Q There's a particular phrase you used. Not the word</p> <p>12 standard or state of the art. Let's see if I can</p> <p>13 find it. Let me see if I can find it. Maybe you</p> <p>14 can find it for me.</p> <p>15 It includes use of meta</p> <p>16 elements and search element optimization. Let me</p> <p>17 see. Maybe it's the bottom of page 11.</p> <p>18 Let me ask you this.</p> <p>19 One of the things that can be</p> <p>20 done to get better search results -- I am using</p> <p>21 your words -- or to get search engine optimization,</p> <p>22 is to do a certain coding process of a website, is</p> <p>23 that correct?</p> <p>24 A Yes.</p> <p>25 Q You describe those steps or processes on the bottom</p>

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<p>1 of page 11 of your report and it continues over to 2 page 12, right? 3 A Yes. 4 Q And when you are talking about those processes that 5 enhance SEO, you talk about, for example, page 6 title should include the chosen key word or phrase. 7 In this case the chosen key word or phrase is The 8 Pond Guy, right? 9 A Yes. 10 Q So my specific question to you is with respect to 11 the processes for coding a website that gives you 12 better SEO, can you tell me about any of these 13 processes that have been adopted or used in any way 14 by The Pond Guy? 15 A No. 16 Q Let me get back a little bit to the business of the 17 companies that are in this case. 18 Can you describe to me what 19 the business is that The Pond Guy is in? 20 A The Pond Guy is in the business of selling and 21 consulting on pond-related building activities. 22 Q And who are The Pond Guys' customers, to your 23 understanding? 24 A Anyone who is interested in learning or building a 25 pond.</p>	<p>1 the customer base of Aquascape, who are the 2 customers of Aquascape? 3 A My understanding is the same customers, similar 4 customers. People interested in learning about 5 ponds or building a pond. 6 Q When you say similar customers, to be clear, can 7 you tell me what you mean by similar, what types? 8 A Similar to The Pond Guys' customers. 9 Q To that would be consumers like me or you up to 10 wholesalers and other -- whoever is interested in 11 something having to do with a pond? 12 A I did not analyze the groups of customers for 13 either The Pond Guy or Aquascape. 14 Q You would agree with me, wouldn't you, that 15 customer groups differ, depending on the products 16 and services of companies that sell things, right? 17 A Yes. 18 Q So the group of customers who, for example, say, 19 buy books may not be the same as the group of 20 customers that buy pond equipment? 21 A I don't have an opinion on that. 22 Q They could be different, correct? 23 A A book customer and a pond customer could be 24 different? They could be different and they could 25 be the same.</p>
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<p>1 Q Is it the case that the customer group of The Pond 2 Guy includes wholesalers who handle pond equipment, 3 you know, the type of place you would go to, like a 4 Home Depot, where if you were building and you 5 needed those -- I am not saying The Home Depot, but 6 that level of the chain? 7 A I don't recall if that is a customer. 8 Q I don't mean The Home Depot. I am talking about 9 that type. 10 A The wholesale type, I don't know. 11 Q Do you know where the customers of The Pond Guy are 12 ultimate consumers? 13 A I believe so, yes. 14 Q Do you know what percentage of the business of The 15 Pond Guy represents ultimate consumers? 16 A No. 17 Q Can you tell me how many customers The Pond Guy 18 has? 19 A No. 20 Q Can you tell me anything about the sales 21 methodology of The Pond Guy beyond some use of 22 social network? 23 A No. 24 Q Let's turn to Aquascape. 25 Can you tell me anything about</p>	<p>1 Q Wouldn't you agree it would be somewhat important 2 to understand the customer base when you are going 3 to render an opinion on the impact of certain 4 things happening on the Internet? 5 A No. 6 Q It doesn't matter to you who the customers are in 7 connection with your opinion, you are just opining 8 that certain things happen on the Internet and 9 sales increase depending upon an optimization of 10 search results, and search engine optimization has 11 a certain impact irrespective of who the customers 12 are and what the products or services are; is that 13 correct? 14 A Yes. 15 Q Your analysis of the impact of the use of social 16 media search engine optimization, that is the basis 17 for your opinion in this case, you agree, could be 18 applied to any business, is that correct? 19 A Are you saying that any business could use SEO and 20 the Internet? 21 Q No. You're not simply opining that you can use it. 22 You have rendered an opinion as to the impact of 23 implementing certain SEO in terms of a positive 24 result in the sale of products or services by a 25 business, right?</p>

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<p>1 A I am rendering an opinion as it relates to</p> <p>2 Aquascape's use of SEO and social media and the</p> <p>3 using The Pond Guy in those areas.</p> <p>4 Q But I think you said earlier it doesn't really</p> <p>5 matter for your analysis who the customers are,</p> <p>6 right?</p> <p>7 A Not for my analysis.</p> <p>8 Q If the customers don't matter, what I am asking is</p> <p>9 whether you can take the same analysis that you did</p> <p>10 in this report and opinion, which is the impact of</p> <p>11 search engine optimization for a certain phrase,</p> <p>12 and whether you simply could apply it to any</p> <p>13 business and say in this circumstance where someone</p> <p>14 takes certain steps to optimize search engine</p> <p>15 results in your opinion, irrespective of the</p> <p>16 customers or anything else, it would have some</p> <p>17 positive affect on sales; that would be likely?</p> <p>18 A I don't have an opinion on that. You can't -- I am</p> <p>19 not saying -- the reason why it's relevant here is</p> <p>20 because there is Internet activity. You could have</p> <p>21 someone that has, you know, a little corner store</p> <p>22 that has no Internet presence and it is very much</p> <p>23 different.</p> <p>24 Q So I think the way you phrased your answer, you</p> <p>25 said not saying here, and you paused, and you said</p>	<p>1 focused solely and specifically on the three words,</p> <p>2 The Pond Guy, is that right? By that I mean how</p> <p>3 it's optimized, where it appears in results, how</p> <p>4 many uses of that phrase are made on social media</p> <p>5 by both Aquascape and The Pond Guy. You weren't</p> <p>6 looking at other phrases. Like you weren't looking</p> <p>7 at the word like "Aqua", your opinion relates to</p> <p>8 those three words and their use in social media and</p> <p>9 the impact of that use, including issues related to</p> <p>10 search engine optimization, is that correct?</p> <p>11 A What's the question?</p> <p>12 Q Your analysis was limited to The Pond Guy in terms</p> <p>13 of the opinion you are rendering?</p> <p>14 A That's one part of my opinion.</p> <p>15 Q Are you analyzing the use of any other words?</p> <p>16 A No.</p> <p>17 Q So the analysis that you did relates to the use of</p> <p>18 the word The Pond Guy on the Internet, right?</p> <p>19 A Correct.</p> <p>20 Q With that as a starting point and taking the</p> <p>21 information you obtained, some from Melissa, some</p> <p>22 from others and some on your own, you come up with</p> <p>23 certain data and then you render an opinion.</p> <p>24 So one question I have is did</p> <p>25 you undertake any analysis where you searched the</p>
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<p>1 here there is Internet activity. I just want to be</p> <p>2 clear.</p> <p>3 The distinction you are making</p> <p>4 now is your analysis certainly applies in this case</p> <p>5 because there is Internet activity as opposed to it</p> <p>6 can be someone selling lemonade out of their back</p> <p>7 yard and making virtually no Internet activity; is</p> <p>8 that the distinction you are making?</p> <p>9 A Yes.</p> <p>10 Q Let me refine my inquiry.</p> <p>11 Take a business circumstance</p> <p>12 where there's a lot of Internet activity related to</p> <p>13 the sale of products or services.</p> <p>14 I'm asking you is your</p> <p>15 analysis that you did that looks into optimization</p> <p>16 of search engine -- search engine optimization and</p> <p>17 your opinion that if you take certain steps to</p> <p>18 optimize, that that will have some positive impact</p> <p>19 on sales, in a business where the Internet is used</p> <p>20 for sales, that analysis would apply to all</p> <p>21 circumstances.</p> <p>22 A I don't have an opinion on that.</p> <p>23 Q Let me ask you some other overall questions before</p> <p>24 I get into some of the specifics.</p> <p>25 It's true that your analysis</p>	<p>1 word "pond" only to see what results you would get,</p> <p>2 where would The Pond Guy show up, where would</p> <p>3 Aquascape show up as opposed to The Pond Guy?</p> <p>4 A No.</p> <p>5 Q If you ran such a search, do you have any opinion</p> <p>6 as to what difference, if any, that would make in</p> <p>7 the search results that you came up with when you</p> <p>8 did The Pond Guy work?</p> <p>9 A No.</p> <p>10 Q So the answer to the next question, I assume, will</p> <p>11 be it's true that you don't know what difference,</p> <p>12 if any, an analysis that you undertook would make</p> <p>13 if you analyzed just the word "pond" and saw what</p> <p>14 kind of results, how often does The Pond Guy come</p> <p>15 up versus Aquascape, where are they in the</p> <p>16 hierarchy, you don't have an opinion about what</p> <p>17 difference if any that would make?</p> <p>18 A No.</p> <p>19 Q Because you haven't done that, is that correct?</p> <p>20 A Correct.</p> <p>21 Q Before we get into the text of your report, I want</p> <p>22 to confirm.</p> <p>23 You didn't interview any</p> <p>24 customers of either Aquascape or The Pond Guy in</p> <p>25 connection with your work that you did in this</p>

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<p>1 report?</p> <p>2 A I did not.</p> <p>3 Q You didn't analyze the customer base of either</p> <p>4 company to determine who the customers were, is</p> <p>5 that correct?</p> <p>6 A I did not.</p> <p>7 Q Did you take into account when you did your report</p> <p>8 anything having to do with who the likely users of</p> <p>9 the Internet would be in searching for pond</p> <p>10 services?</p> <p>11 A No.</p> <p>12 Q Are you aware of any reports that would be</p> <p>13 available for you to look at or any data that would</p> <p>14 help you determine who is buying this stuff using</p> <p>15 the Internet, anything at all?</p> <p>16 A I'm not aware of.</p> <p>17 Q You didn't look for any, right?</p> <p>18 A That's correct.</p> <p>19 Q And I take it you would agree that doesn't really</p> <p>20 make any difference to your analysis, right?</p> <p>21 A No.</p> <p>22 Q Well, I guess we have a double negative.</p> <p>23 Do the identities of the</p> <p>24 customers of either Aquascape or The Pond Guy,</p> <p>25 would that make any difference if you knew their</p>	<p>1 eleven years?</p> <p>2 A I moved from a research analyst to an analyst to a</p> <p>3 director of business development to a principal.</p> <p>4 Q Okay. And what kind ever work did you do -- strike</p> <p>5 that.</p> <p>6 What were the types of clients</p> <p>7 that you personally serviced when you were at</p> <p>8 Consor?</p> <p>9 A So we did intellectual property valuation work,</p> <p>10 non-litigation context, companies that needed a</p> <p>11 brand valued or some intellectual property valued</p> <p>12 for various reason, tax estates. I have a business</p> <p>13 valuation -- about how much is intellectual</p> <p>14 property worth. Worked with a lot of clients that</p> <p>15 did co-branding. For instance, they're sharing</p> <p>16 brands. So I helped consult on those types of</p> <p>17 relationships.</p> <p>18 Then the litigation context</p> <p>19 similar to what I am doing now. Rights of</p> <p>20 publicity trademark, copyright infringement.</p> <p>21 Q Do you currently do the valuation work at your</p> <p>22 current company, or you don't do that anymore?</p> <p>23 A The non-litigation, yes, we still do that.</p> <p>24 Q In connection with any of the -- strike that.</p> <p>25 Have you consulted with any</p>
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<p>1 identities in the analysis that you undertook?</p> <p>2 A No.</p> <p>3 Q By identities, I don't mean names. I mean who are</p> <p>4 they -- consumers, wholesalers. No difference?</p> <p>5 A Correct.</p> <p>6 MR. GABRIEL: Let's take a</p> <p>7 break.</p> <p>8 (WHEREUPON A RECESS WAS HAD)</p> <p>9 Q (By Mr. Gabriel continuing): Let's get into your</p> <p>10 educational background.</p> <p>11 Can you briefly identify your</p> <p>12 college and any post graduate education?</p> <p>13 A Yes. I have a bachelor's degree in cinema from San</p> <p>14 Francisco State University. I have a master's</p> <p>15 degree in television, film and new media production</p> <p>16 from San Diego State University.</p> <p>17 Q What employment experience do you have before your</p> <p>18 current work?</p> <p>19 A I worked for a intellectual property valuation firm</p> <p>20 for over eleven years, very similar firm. Then I</p> <p>21 broke out on my own.</p> <p>22 Q What was the firm you worked for for over eleven</p> <p>23 years?</p> <p>24 A Consor. C-O-N-S-O-R.</p> <p>25 Q What position did you have at Consor during the</p>	<p>1 companies, you personally, on the issue of search</p> <p>2 engine optimization?</p> <p>3 A Yes.</p> <p>4 Q What types of businesses have you done that work</p> <p>5 for?</p> <p>6 A Typically branded businesses. It's kind of a brand</p> <p>7 value maximization service that we provide. And we</p> <p>8 will help our clients understand what kind of</p> <p>9 traffic is coming to their website based on brand</p> <p>10 search and how strong is their brand as it relates</p> <p>11 to the world of the Internet.</p> <p>12 Q Where did you get the knowledge and expertise in</p> <p>13 that area other than from doing it? In other</p> <p>14 words, do you have any education or other types of</p> <p>15 experience to --</p> <p>16 A My master's degree had a new media aspect of it, so</p> <p>17 that was getting into the digital world. I was a</p> <p>18 web designer. And, you know, back then, you know,</p> <p>19 building a website was one thing. Then it turned</p> <p>20 into how to be found on the website. So naturally</p> <p>21 it moved into the customizing of websites for</p> <p>22 better search results.</p> <p>23 Q I like the phrase back then. It now means, you</p> <p>24 know, when the Internet kind of started, like it</p> <p>25 was a hundred years ago.</p>

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<p>1 A Right.</p> <p>2 Q Have you authored any articles on search engine</p> <p>3 optimization?</p> <p>4 A I have not.</p> <p>5 Q Have you consulted on search engine optimization</p> <p>6 with any businesses that you could identify as</p> <p>7 being in some manner similar to the businesses at</p> <p>8 issue in this case?</p> <p>9 A I guess I would have to know what your definition</p> <p>10 of similar is, if you are talking pond related</p> <p>11 or --</p> <p>12 Q Anything construction related, you know, aquatic</p> <p>13 related, not Nabisco Oreo cookies, which I think we</p> <p>14 both could agree are not related.</p> <p>15 Anything that you could think</p> <p>16 of that you would say yeah, this is somewhat</p> <p>17 similar?</p> <p>18 A Not that I recall, at this moment.</p> <p>19 Q Getting back to what you relied upon and</p> <p>20 considered, your report -- strike that.</p> <p>21 One of your opinions and/or</p> <p>22 conclusions is that there was a ramp up in social</p> <p>23 media activity by Mr. Wittstock and Aquascape, is</p> <p>24 that correct?</p> <p>25 A Yes.</p>	<p>1 Based on his activity on facebook and twitter, he</p> <p>2 practices what he preaches.</p> <p>3 Q Is it fair to say the time period that you examined</p> <p>4 is 2009 going forward?</p> <p>5 A I don't -- I know that I looked at '09 through</p> <p>6 today and I notice there wasn't much activity in</p> <p>7 those early days before 2013. So I think that's</p> <p>8 fair to say.</p> <p>9 Q Now, you understand that there was Internet</p> <p>10 activity by Aquascape and Mr. Wittstock prior to</p> <p>11 2009, is that correct?</p> <p>12 A Yes.</p> <p>13 Q And can you tell me anything about the nature of</p> <p>14 that activity? I'm specifically referring to any</p> <p>15 references to The Pond Guy on the Internet, placed</p> <p>16 there in any way, shape or form by Mr. Wittstock or</p> <p>17 Aquascape. Can you tell me what there was, whether</p> <p>18 there was something, where was it, anything at all</p> <p>19 about that?</p> <p>20 A No, I can't.</p> <p>21 Q I take it then, you can't answer the question for</p> <p>22 how long has Mr. Wittstock or Aquascape used the</p> <p>23 phrase The Pond Guy on the Internet in connection</p> <p>24 with its business activities?</p> <p>25 A I don't know how long.</p>
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<p>1 Q And can you tell me more specifically when you use</p> <p>2 the phrase ramp up, are you talking about a period</p> <p>3 of time? In other words, what are you measuring?</p> <p>4 Something can ramp up in different ways. More,</p> <p>5 quicker, longer? I am trying to understand what</p> <p>6 you mean by that exactly.</p> <p>7 A I would say it's an all of the sudden ramp up.</p> <p>8 Q Okay.</p> <p>9 A It's almost based on blog posts and reviewing the</p> <p>10 actual traffic, that it was an explosion of social</p> <p>11 media and Internet activity I would say.</p> <p>12 Q So sudden explosion -- using your words -- what</p> <p>13 time period did you examine so that you could opine</p> <p>14 there's the pre-explosion period, the pre-sudden</p> <p>15 period, and now we have a sudden -- and again I am</p> <p>16 using your two words for question purposes --</p> <p>17 sudden and explosion; what were you looking at?</p> <p>18 A I looked back 2009 through 2012. Not much was</p> <p>19 happening. 2013, it was a big ramp up. That's</p> <p>20 more of where the explosion happened. 2014, you</p> <p>21 know, we don't have much data because we're just</p> <p>22 into the year.</p> <p>23 Based on the obsessed nature</p> <p>24 of Wittstock, if you don't have a social media</p> <p>25 program in 2014, you're going to be left behind.</p>	<p>1 Q You don't know if that goes back to 1996 or 2005 or</p> <p>2 somewhere in between?</p> <p>3 A No.</p> <p>4 Q Now, given your observation of the use of the</p> <p>5 Internet generally and social media in particular,</p> <p>6 you would agree that there has been a sudden</p> <p>7 explosion of sales and marketing activities in</p> <p>8 social media as a general proposition by companies</p> <p>9 who sell through the Internet over the past few</p> <p>10 years, is that correct?</p> <p>11 A I wouldn't phrase it as a sudden explosion. I</p> <p>12 would say social media is becoming more popular.</p> <p>13 Q What phrase did you use in your report to describe</p> <p>14 the importance of social media over the last few</p> <p>15 years?</p> <p>16 Let me look at a few of the</p> <p>17 places and make sure I understand what you're</p> <p>18 saying.</p> <p>19 A Okay.</p> <p>20 Q Go to page 4. In the middle of the page your title</p> <p>21 is Growing Importance of the Internet and Social</p> <p>22 Media at Aquascape.</p> <p>23 In it you go through a</p> <p>24 discussion of how social media and the Internet are</p> <p>25 important to Aquascape. And one of the statements</p>

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<p style="text-align: right;">Page 58</p> <p>1 you make is Greg Wittstock appears to be an 2 increasingly frequent user of these tools to 3 promote Aquascape's business. 4 And the tools are social 5 media, is that correct, that is what you are 6 talking about, and the Internet? 7 A Correct. 8 Q Going to page 5. You have some data points that 9 you identify. And I am quoting, "Essentially, 10 marketing is shifting to rely more and more 11 websites, Internet search and social media." 12 You cite a number of bits of 13 information in that regard, is that correct? 14 A Yes. 15 Q Let me take you to page 8 -- actually let me take 16 you to the bottom of page 7. 17 I'm not trying to have you 18 ignore the rest of it, so if you want to stop and 19 ask a question and say let me read the question, 20 it's not an exercise. 21 A Thank you. 22 Q I am just directing you to a part because I want to 23 read a particular sentence. At the bottom of the 24 page, I think it is fair to say you are summing up 25 what you conclude as Mr. Wittstock's perspective on</p>	<p style="text-align: right;">Page 60</p> <p>1 Q So you don't know anything about how important it 2 is to that company, right? 3 A My opinion is in general, in social media and 4 Internet, it's very important. I did not have 5 conversations with anyone at The Pond Guy related 6 to that topic. 7 Q Then you move on in your report on page 8. You 8 have a discussion of Aquascape's use of web 9 optimization. First I want to make sure we 10 understand what you looked at to analyze that 11 question. So let me see if I can eliminate certain 12 things. 13 You didn't review any 14 contracts or agreements that Aquascape has with any 15 third parties where the third parties are involved 16 in assisting, consulting or implementing search 17 engine optimization for Aquascape, is that right? 18 A I did not. 19 Q Do you know whether there are any such third 20 parties that are doing such work for Aquascape? 21 A I don't know. 22 Q Can you show me exactly where in your report you 23 describe how you determine what website 24 optimization steps Aquascape has taken? 25 I can read the words, but I</p>
<p style="text-align: right;">Page 59</p> <p>1 the use of the Internet and social media having 2 used it above. I am looking at your sentence on 3 the bottom of 7. 4 "From his posted statements 5 and opinions, it appears that Wittstock believes 6 the use of the Internet and social media are 7 critical tools in business marketing." 8 That's your opinion, right? 9 A Yes. 10 Q You're basing that in part on all the stuff that 11 comes above in the report, which is quoting from 12 his blog and the statements he's made about how 13 critical and important the Internet and social 14 media is, right? 15 A Yes. 16 Q So based upon your conversations with The Pond Guy, 17 is it your opinion that The Pond Guy, and 18 specifically Mr. Blake, believe the use of the 19 Internet and social media are critical tools in 20 business marketing? 21 A I don't have that opinion. 22 Q So can you describe to me what view The Pond Guy 23 has about the use of social media and the Internet 24 in connection with its business marketing? 25 A No.</p>	<p style="text-align: right;">Page 61</p> <p>1 want you to tell me where you say it. 2 A So on page 10. 3 Q First of all, on page 10 you say Use of The Pond 4 Guy Trademark at Aquascape. Then you continue to 5 discuss below that meta elements and search engine 6 optimization. 7 So your discussion meta 8 elements and search engine optimization, that 9 relates to the use of the phrase The Pond Guy, 10 right? 11 A This section here is, yes, use of The Pond Guy 12 trademark at Aquascape.com. 13 Q Did you do any analysis of search engine 14 optimization that was done by Aquascape for any 15 other term? 16 A The only other search I did as it related to 17 another term was the use of the name Aquascape on 18 their website. 19 Q What conclusions or opinions did you draw from 20 that, or is that just some data that you used for 21 other purposes? 22 A It was just kind of a -- I wanted to understand, 23 you know, the use of Aquascape on the website, 24 which returns about nine thousand results compared 25 to the use of The Pond Guy on the websites, which</p>

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<p>1 returns about nineteen hundred results. 2 Q On which website? 3 A On AquascapeInc.com. 4 Q When you are describing you, are you talking about 5 you personally? 6 A Yes. 7 Q The search that you did for the term Aquascape was 8 on the Aquascape website and what you wanted to get 9 was a comparison of the appearances on the 10 Aquascape website for Aquascape as compared with 11 The Pond Guy, is that correct? 12 A Yes. 13 Q You got nine thousand for Aquascape about? 14 A Roughly. 15 Q And nineteen hundred for The Pond Guy. 16 What opinions or conclusions 17 did you draw from that comparison, if any? 18 A I didn't have any written conclusions in this 19 report. But, you know, the reason why I did it is 20 to get an understanding for them to use the name 21 Aquascape is important to them. 22 Q Less important than The Pond Guy? 23 A I don't have an opinion on that. 24 Q Did you search any other terms for having to do 25 with your analysis other than The Pond Guy, which</p>	<p>1 the question? 2 Q I want to know how you came up with the search 3 results that you then talk about in terms of this 4 came in first, this came in third. 5 A As it relates to the search results, the first 6 thing is launched the web browser. In this case it 7 was Fire Fox. Then I cleared the history and the 8 cash so it was a clean slate with no bias. And 9 then I typed in the word The Pond Guy and hit 10 return. 11 Q And you observed some results and took some 12 notations. 13 Did you do screen shots? 14 A Yes, yes. 15 Q Can you tell me very briefly how did you preserve 16 the results other than screen shots? I don't want 17 to assume anything. 18 A They are in my documents. So I print a PDF so it's 19 at that moment my results are provided in this 20 report. 21 Q Approximately when was that moment for The Pond 22 Guy? 23 I'm not asking you for a date. 24 Was it sometime in March of 2014, as opposed to 25 January, if you remember?</p>
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<p>1 you did a lot of work with and this circumstance 2 you identified where you searched Aquascape? 3 A No. 4 Q With respect to the analysis that starts on the 5 bottom of page 10 of the Use of Meta Elements and 6 Search Engine Optimization, first you describe 7 search engines and how they work essentially. And 8 then you get into on the bottom of page 11 a way 9 you can code to get better search results, is that 10 correct? 11 A Yes. 12 Q So you reviewed -- strike that. 13 You compiled information with 14 respect to search results for the terms The Pond 15 Guy with different search engines, right? 16 A This analysis focused on Google. 17 Q So tell me how you did that. In other words, what 18 steps did you take to come up with what place a 19 result was in? 20 A Okay. So the Schedule 1 on page 38 walks you 21 through that process. 22 Q I get that the schedule does. Can you tell me in 23 words? 24 A Yeah. 25 So I don't misspeak, what was</p>	<p>1 A I don't recall. 2 Q But -- 3 A This year. 4 Q This year. And is there some data or document that 5 would tell you when you did that? 6 A Yes. 7 Q It's somewhere in here? 8 A Yes. 9 Q Let's look for it during the break. 10 You would agree, wouldn't you, 11 that if I went on the Internet today and I took the 12 steps you took and used Fire Fox and cleared the 13 cash and I put in the search and Google for The 14 Pond Guy, that I could get different results than 15 you got, right? 16 A I did not ask you to do that, so I don't know for a 17 fact. But there is a possibility. 18 Q Wait a minute. You have experience. You know how 19 the Internet works and how search engines work. 20 You are here to as an expert to talk about search 21 engine optimization? 22 A Yes. 23 Q Wouldn't you agree with me that two people 24 searching the same term an hour apart can come up, 25 and do come up, with different results?</p>

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<p>1 A I think if you followed these steps of clearing the 2 cash and as I mentioned here in my Schedule I, most 3 likely come up with the same results. 4 Q But you acknowledge and you are aware of cases and 5 circumstances where the results are different, is 6 that correct? 7 A There's a possibility. 8 Q You have observed that, haven't you, in your 9 experience where two individuals can search the 10 same term, take the same steps and the results 11 would be different, even if they search the same 12 day, right? 13 A Using my technique in following these procedures 14 and to -- you know, I have done this throughout me 15 being hired on this case and in previous projects, 16 you typically come up with the same search results 17 if you follow the same steps. 18 Q But you acknowledge that sometimes you don't? 19 A There's a possibility. 20 Q Well, I want to make sure that we are clear. 21 Is your testimony that you are 22 not aware of the fact that people can search the 23 same term, use the same approach that you have 24 identified on the same day and you have never ever 25 heard of or are or are aware of any circumstance</p>	<p>1 best practices -- that was the term I was looking 2 for -- best practices in search engine 3 optimization, there are no guarantees, is that 4 correct? You can't fix it in a way other than 5 buying a location? 6 A That's correct. 7 Q And there are lots of work done by many, many 8 companies internally and with consultants to try to 9 optimize those results? 10 A Yes. My opinion is when you type in The Pond Guy, 11 the results I have in the report are what appear. 12 And Aquascape does show up in the second and third 13 position. 14 Q You would agree with me, wouldn't you, that you 15 don't know what difference, if any, would be made 16 in the results if The Pond Guy was taking certain 17 search optimization result steps, because you don't 18 even know if The Pond Guy is taking any, right? 19 A The second part of the question is I don't know 20 what SEO practices they are taking. 21 What was the first part? 22 Q Since you don't know what practices The Pond Guy 23 has in connection with SEO, if The Pond Guy changed 24 its practices for SEO or implemented new ones, you 25 have no opinion upon what impact that would have</p>
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<p>1 where the results were different in terms of the 2 display in the hierarchies in the pages? 3 A There is a possibility there could be a difference. 4 I don't typically go through asking people to do 5 this. But in my analysis when you follow these 6 exact steps, typically the same results appear. 7 Q Have you checked your results by doing the same 8 thing since you authored this report? 9 A Yes. 10 Q What have you come up with? 11 A The same results. 12 Q In terms of what? 13 A The positioning of the search results. 14 Q When is the last time you checked? 15 A I don't recall. 16 Q So it is the case, isn't it, that nobody outside of 17 Google really quite understands exactly how it is 18 that where you appear in the results comes about? 19 There are arguments and lots of literature about 20 factors, but we don't have publicly available to 21 anybody the exact algorithm or approach used to get 22 the specific results? 23 A The Google algorithms are proprietary. 24 Q So while you can examine what may change those 25 results, and there's lots of data about that and</p>	<p>1 upon the results you've come up with when you 2 search The Pond Guy, is that correct? 3 A Correct. 4 Q Let me turn to the whole issue of auto fill and 5 auto complete and Google. This is on page 13. 6 You looked at that question 7 too when you discussed what happens when a user 8 visits Google and starts typing The Pond Guy into 9 the search area, right? 10 A Yes. 11 Q On page 13 your figure 2 displays -- is that a 12 screen spot? 13 A Yes. 14 Q Displays the auto fill results for The Pond -- 15 looks like you got up to the letter "G", right? 16 A Yes. 17 Q Then what auto fill did on the particular date when 18 you did this, correct? 19 A That's correct. 20 Q So by the way, did you -- strike that. 21 Let's take the second listing, 22 The Pond Guy's T.V. show. You see that? 23 A Yes. 24 Q Then you say in your report the second Google auto 25 complete suggestion is The Pond Guys T.V. show?</p>

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<p>1 A Yes.</p> <p>2 Q The first page search results for The Pond Guy T.V.</p> <p>3 show including ten organic listings and seven out</p> <p>4 of the ten are websites related to Wittstock and</p> <p>5 Aquascape.</p> <p>6 I take it, you clicked on The</p> <p>7 Pond Guys T.V. show?</p> <p>8 A Correct.</p> <p>9 Q And the footnote 27 takes us where?</p> <p>10 A To doc 28A.</p> <p>11 Q The Google search results search for The Pond Guys</p> <p>12 T.V. show as of March 7, 2014, which is, I take it,</p> <p>13 the results you got on that date when you did it,</p> <p>14 correct?</p> <p>15 A Correct.</p> <p>16 Q Let me ask you a little bit about this T.V. show.</p> <p>17 What is your understanding</p> <p>18 about the T.V. show as it relates to The Pond Guy?</p> <p>19 A My understanding is that Aquascape is looking into</p> <p>20 a reality T.V. show.</p> <p>21 Q And when you came up with this -- when you went to</p> <p>22 the page with the results for The Pond Guys T.V.</p> <p>23 show, tell me what you mean by ten organic</p> <p>24 listings, what do you mean by the phrase organic?</p> <p>25 A Not paid.</p>	<p>1 rather than the Plaintiff?</p> <p>2 A The basis is, as I said in my report, that when you</p> <p>3 are on social media and you are searching for The</p> <p>4 Pond Guy, the Defendants' business appears, or</p> <p>5 Wittstock personally, which he tends to be</p> <p>6 connected to his business.</p> <p>7 Q If I went to my facebook page and I spent the next</p> <p>8 six months typing in I love My Pond Guy, and I had</p> <p>9 fifty other people type in Allen Gabriel Loves His</p> <p>10 Pond Guy and I did that nonstop as much as I</p> <p>11 possibly could and have others do it, eventually</p> <p>12 would that impact Mr. Blake's business?</p> <p>13 A I don't know.</p> <p>14 Q Wouldn't there be people associating me with The</p> <p>15 Pond Guy, if I fill up my facebook page and</p> <p>16 suddenly explode on my page talking about how I</p> <p>17 love The Pond Guy who takes care of my coy pond?</p> <p>18 A I don't know. I think as it relates to Wittstock</p> <p>19 and actually his accounts, including The Pond Guy,</p> <p>20 say, the twitter account At The Pond Guy --</p> <p>21 Q So it is more than just a use in the text, you are</p> <p>22 talking about the name of the account now too?</p> <p>23 A Yes.</p> <p>24 Q Do you know to what extent The Pond Guy was</p> <p>25 associated or affiliated with Mr. Wittstock up to</p>
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<p>1 Q You say seven out of the ten are websites related</p> <p>2 to Wittstock and Aquascape, what were the other</p> <p>3 three?</p> <p>4 A I don't recall. We could look at the document.</p> <p>5 Q Would it make any difference to your -- strike</p> <p>6 that.</p> <p>7 You are also opining about the</p> <p>8 impact of the use of The Pond Guy in a T.V. show</p> <p>9 featuring Greg Wittstock as part of your report,</p> <p>10 right?</p> <p>11 A Yes.</p> <p>12 Q At the very end you talk about that you say -- go</p> <p>13 to page 30.</p> <p>14 "As the Defendants' social</p> <p>15 media use is increasing and a reality T.V. show may</p> <p>16 be released, more and more Internet search and</p> <p>17 social media users are likely to associate the</p> <p>18 phrase The Pond Guy with the Defendants' business</p> <p>19 rather than TPG."</p> <p>20 You see that?</p> <p>21 A I do.</p> <p>22 Q What is the basis for your opinion that if social</p> <p>23 media use increases, more and more Internet search</p> <p>24 or social media users are likely to associate the</p> <p>25 phrase The Pond Guy with the Defendants' business</p>	<p>1 2009?</p> <p>2 A No.</p> <p>3 Q Does that matter to your analysis at all?</p> <p>4 A No.</p> <p>5 Q Do you have any understanding as to whether there's</p> <p>6 been any association between Mr. Wittstock and the</p> <p>7 phrase The Pond Guy in any industry or segment of</p> <p>8 any industry whatsoever?</p> <p>9 A I know that he calls himself The Pond Guy.</p> <p>10 Q But you are opining about an association. You are</p> <p>11 talking about Internet search and social media</p> <p>12 users are likely to associate the phrase The Pond</p> <p>13 Guy with the Defendants.</p> <p>14 Are you aware of any</p> <p>15 circumstance where, say, before 2009 there was an</p> <p>16 association among Internet users of Mr. Wittstock</p> <p>17 and The Pond Guy?</p> <p>18 A No.</p> <p>19 Q Would that make any difference to your analysis at</p> <p>20 all?</p> <p>21 A No.</p> <p>22 Q So it is only the events and circumstances post</p> <p>23 2009 that you have considered at all in connection</p> <p>24 with your analysis?</p> <p>25 A Not necessarily. I have not put boundaries around</p>

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<p>1 the dates. I know some of my charts go back to</p> <p>2 2009. But it wasn't part of my analysis to</p> <p>3 determine dates of use.</p> <p>4 Q Let me ask you a different question.</p> <p>5 I would like you to assume</p> <p>6 that 100 percent of the customers of The Pond Guy</p> <p>7 are ultimate consumers. In other words, people</p> <p>8 like you and me, not wholesalers or stores or</p> <p>9 distributors. And 100 percent of the customers of</p> <p>10 Aquascape are not consumers, but wholesalers,</p> <p>11 stores, distributors.</p> <p>12 And without additional</p> <p>13 information, would your opinion as to the impact of</p> <p>14 the activities of both companies on social media be</p> <p>15 any different than it is now?</p> <p>16 A No.</p> <p>17 Q Why is that?</p> <p>18 A Because the Internet is used by whether you are an</p> <p>19 end user or a distributor or store owner. People</p> <p>20 go to the Internet.</p> <p>21 Q Look at your last bullet point on page 30. "The</p> <p>22 continued and expanding use of the phrase The Pond</p> <p>23 Guy by Aquascape will be detrimental to TPG."</p> <p>24 Why will it be detrimental?</p> <p>25 A You can phrase it as a perfect storm. Aquascape is</p>	<p>1 percent represents.</p> <p>2 A 25 percent of search result traffic clicks on the</p> <p>3 first position.</p> <p>4 Q So that means if ten people are searching The Pond</p> <p>5 Guy -- let's make it a better number. If 25</p> <p>6 percent of the --</p> <p>7 A How about one hundred.</p> <p>8 Q Of one hundred, when they search The Pond Guy --</p> <p>9 A Twenty-five out of a hundred will click on the</p> <p>10 first result.</p> <p>11 Q Clicking is one thing. Tell me how it is</p> <p>12 detrimental to the business of The Pond Guy.</p> <p>13 A Because you are losing 25 percent or whatever the</p> <p>14 number is, losing traffic.</p> <p>15 Q Which means?</p> <p>16 A Especially to a competitor can be detrimental.</p> <p>17 Q How?</p> <p>18 A The loss of sales.</p> <p>19 Q So ultimately you are winding up in your opinion is</p> <p>20 if you are not in first place, that's got to hurt</p> <p>21 because 25 percent of the people click on the first</p> <p>22 place item, and then you look at some conversion</p> <p>23 rates and that turns into business. So if you are</p> <p>24 not getting the 25 percent but you get something</p> <p>25 less than that, you are getting less sales, right,</p>
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<p>1 dominating the use of The Pond Guy in social media</p> <p>2 and various social media accounts, as I explained</p> <p>3 in my report. Aquascape is using The Pond Guy in</p> <p>4 their SEO practices on their website and combining</p> <p>5 those two worlds together around the term The Pond</p> <p>6 Guy. There is a perfect storm brewing for</p> <p>7 Aquascape and Wittstock to bump TPG down and for</p> <p>8 them to go up.</p> <p>9 Q What is the detriment you are talking about?</p> <p>10 A The detriment, the first position on Google is a</p> <p>11 valuable position. My client, you know, it has</p> <p>12 that right now.</p> <p>13 Q In what sense? I am trying to get you to be more</p> <p>14 specific. In what sense? Why would it be</p> <p>15 detrimental for The Pond Guy not to be in first</p> <p>16 place in the business we are talking about?</p> <p>17 A Research shows that around 25 percent of clicks go</p> <p>18 on -- click that first position, search result. To</p> <p>19 lose that first position search result is</p> <p>20 detrimental to the business, to The Pond Guys'</p> <p>21 business.</p> <p>22 Q If 25 percent of the people click on the first</p> <p>23 result first -- is that what you are saying?</p> <p>24 A I --</p> <p>25 Q I want to make sure I understand what the 25</p>	<p>1 isn't that what you are saying?</p> <p>2 A That's part of it, yes.</p> <p>3 Q Let's take that part of it.</p> <p>4 I think you said, you know,</p> <p>5 almost everybody uses the Internet. With that in</p> <p>6 mind, the analysis that you just made, would you</p> <p>7 say there's the same detriment and would you apply</p> <p>8 the same analysis if Aquascape and The Pond Guy had</p> <p>9 completely different customer bases? In other</p> <p>10 words, I am giving you a hypothetical.</p> <p>11 Aquascape doesn't sell to</p> <p>12 consumers at all, ultimate consumers. And The Pond</p> <p>13 Guy only sells to ultimate consumers. Would your</p> <p>14 opinion be that you would have the same detrimental</p> <p>15 impact on sales with those facts?</p> <p>16 A I don't have an opinion on that. These two</p> <p>17 companies are in the same space of ponds.</p> <p>18 Q So your assumption is that the detriment arising</p> <p>19 from not being in first place exists irrespective</p> <p>20 of who the customers of the companies are, right?</p> <p>21 A Yes. Losing that first place position, I am not</p> <p>22 basing that on comparing customers. I am talking</p> <p>23 about SEO practices that put you on top and you get</p> <p>24 more click through because you are on top.</p> <p>25 Q And then you have more conversions once you get</p>

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<p style="text-align: right;">Page 78</p> <p>1 clicks?</p> <p>2 A I haven't analyzed that, but business practices,</p> <p>3 you know --</p> <p>4 Q Let me pick up on what you just said.</p> <p>5 You haven't done any analysis</p> <p>6 of conversion rates after clicks and sales on the</p> <p>7 Internet for either Aquascape or The Pond Guy,</p> <p>8 right?</p> <p>9 A Correct.</p> <p>10 Q So you don't really have an opinion about the</p> <p>11 impact of clicks and what happens when 25 percent</p> <p>12 click on Aquascape because it's in first position</p> <p>13 versus what happens in the real world, if 25</p> <p>14 percent would click on The Pond Guy if it was in</p> <p>15 the first position, correct, you haven't done that</p> <p>16 analysis?</p> <p>17 A Sorry?</p> <p>18 Q You haven't analyzed the impact on sales?</p> <p>19 A I have not.</p> <p>20 Q Because you don't know what the impact on clicks is</p> <p>21 on the sales of either company?</p> <p>22 A That's correct.</p> <p>23 Q Because you don't know what the conversion rate is</p> <p>24 for either company, right?</p> <p>25 A That's correct.</p>	<p style="text-align: right;">Page 80</p> <p>1 the name of my client. It's the URL. As it</p> <p>2 relates to them marketing their business, they</p> <p>3 market themselves as The Pond Guy. And with</p> <p>4 Aquascape, the name of their company is Aquascape.</p> <p>5 So I can tell you without</p> <p>6 analyzing TPG's SEO practices, that the fact that</p> <p>7 their business name is The Pond Guy and their URL</p> <p>8 is The Pond Guy and their marketing is related to</p> <p>9 The Pond Guy and the fact that they show up in the</p> <p>10 first position when you search for The Pond Guy,</p> <p>11 that is very important to them.</p> <p>12 Q Are you inferring anything about whether they do</p> <p>13 practice search engine optimization?</p> <p>14 A No.</p> <p>15 Q You don't know whether The Pond Guy is doing any of</p> <p>16 that?</p> <p>17 A All I can look at are the results. They are in the</p> <p>18 first page. Something is happening for them to be</p> <p>19 in the first spot.</p> <p>20 I have not analyzed their</p> <p>21 techniques, but I know that they have -- they have</p> <p>22 gained the first spot search results.</p> <p>23 You know, as an SEO person and</p> <p>24 as a website person, that doesn't happen</p> <p>25 accidentally.</p>
<p style="text-align: right;">Page 79</p> <p>1 Q You are applying general propositions that state if</p> <p>2 you are higher up in search results, you are going</p> <p>3 to get more clicks. And if you get more clicks,</p> <p>4 it's likely you are going to get more sales, is</p> <p>5 that correct?</p> <p>6 A Correct.</p> <p>7 Q That proposition is certainly true for businesses</p> <p>8 that use the Internet for marketing and sales</p> <p>9 activities, right?</p> <p>10 A Yes.</p> <p>11 Q Go to the first bullet point on the same page where</p> <p>12 you conclude. It is your opinion that, "Aquascape</p> <p>13 is strategically using the phrase The Pond Guy in</p> <p>14 the design, content and optimization of its</p> <p>15 website, which leads to more website traffic and</p> <p>16 potentially increased sales likely at the expense</p> <p>17 of TPG's website traffic and sales."</p> <p>18 That is one of your ultimate</p> <p>19 four opinions?</p> <p>20 A Correct.</p> <p>21 Q You cannot answer the question and, therefore, you</p> <p>22 have no opinion about whether TPG is strategically</p> <p>23 using the phrase The Pond Guy in the design,</p> <p>24 content and optimization of its website, right?</p> <p>25 A I can tell you it's the name of the company. It is</p>	<p style="text-align: right;">Page 81</p> <p>1 Q Let's look at that.</p> <p>2 First of all, let's define</p> <p>3 what you are talking about when you say -- well, I</p> <p>4 want to understand exactly what you just said.</p> <p>5 When you say they have gained</p> <p>6 the first spot, who and where?</p> <p>7 A I'll back up a little bit, if I could.</p> <p>8 Q Okay.</p> <p>9 A You keep asking me if I know The Pond Guy search</p> <p>10 engine optimization activities. I haven't analyzed</p> <p>11 that. But I can look at the search results and see</p> <p>12 they are in the first position.</p> <p>13 Q Where?</p> <p>14 A On the Google search.</p> <p>15 Q For what search term?</p> <p>16 A The Pond Guy.</p> <p>17 Q The Pond Guy is in the first position on Google</p> <p>18 search for The Pond Guy?</p> <p>19 A That's correct.</p> <p>20 Q And you have just described what attributes you</p> <p>21 believe impact, that is where they are there?</p> <p>22 A Correct.</p> <p>23 Q The first one is it's the name of their business,</p> <p>24 right?</p> <p>25 A It's the name of their business, therefore, that</p>

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<p style="text-align: right;">Page 82</p> <p>1 phrase is used throughout their website.</p> <p>2 Q And would you agree with me that the name of a</p> <p>3 business is a critical component that relates to</p> <p>4 optimizing your position in search engine results?</p> <p>5 A For that phrase.</p> <p>6 Q Well --</p> <p>7 A You might --</p> <p>8 Q I'm asking generally.</p> <p>9 A What is the question?</p> <p>10 Q Isn't the name of your business that you use on the</p> <p>11 Internet something that has -- isn't it a critical</p> <p>12 component of where you wind up in search results of</p> <p>13 your company, the name of your business?</p> <p>14 MS. KLIMA: I object to the</p> <p>15 form.</p> <p>16 THE WITNESS: Someone -- I'm</p> <p>17 going hypothetical here.</p> <p>18 Q (By Mr. Gabriel continuing): Of course.</p> <p>19 A Someone could have their business up on the website</p> <p>20 and not use the name of the business often and not</p> <p>21 appear in the first spot.</p> <p>22 Q Based upon all your experience that you have</p> <p>23 described in your consulting, would you agree with</p> <p>24 me that it is generally the case that a company</p> <p>25 uses its business name that it presents to the</p>	<p style="text-align: right;">Page 84</p> <p>1 A Nineteen hundred, around there.</p> <p>2 Q You would agree that on the Aquascape website, the</p> <p>3 use of Aquascape as a term on its own website far</p> <p>4 exceeds any use of The Pond Guy, right?</p> <p>5 A Yes.</p> <p>6 Q By the way, when you did all your examination and</p> <p>7 searching and review of websites, can you tell me</p> <p>8 anything about how and under what circumstances The</p> <p>9 Pond Guy appears on any website of Aquascape or</p> <p>10 Mr. Wittstock? In other words, is it a brand name</p> <p>11 for products; how did it appear when you saw it?</p> <p>12 A Well, I did analyze the</p> <p>13 AquascapeInc.com/AboutThePondGuy page.</p> <p>14 Q Okay.</p> <p>15 A It was used throughout that page. We could look at</p> <p>16 that document, if you like. It was in the title.</p> <p>17 It was in the meta tags. It was scattered</p> <p>18 throughout the text.</p> <p>19 Q What about anywhere else, the about page, the rest</p> <p>20 of the site?</p> <p>21 A There are nineteen hundred. That number could be a</p> <p>22 bit off. But it is in my report. Other references</p> <p>23 to The Pond Guy. Which includes links on each page</p> <p>24 to the About The Pond Guy page.</p> <p>25 Q Was it used in reference to a brand of products?</p>
<p style="text-align: right;">Page 83</p> <p>1 public -- I am not talking about some name that</p> <p>2 nobody ever heard of -- it uses its business name</p> <p>3 prominently on its website, as a general</p> <p>4 proposition, would you agree with that?</p> <p>5 A If a business should use their name on the</p> <p>6 website -- but the business could sell products</p> <p>7 which they want more business from and focus on</p> <p>8 those product names more than the business name.</p> <p>9 Q Is it the case that in your experience the business</p> <p>10 name is something that is generally prominently</p> <p>11 featured on the website of a business?</p> <p>12 A A business name, yes.</p> <p>13 Q Prominent use of a business name has a positive</p> <p>14 impact on where a company appears in search</p> <p>15 results, right?</p> <p>16 A Possibly.</p> <p>17 Q Does the Aquascape website prominently feature its</p> <p>18 business name on its website?</p> <p>19 A I don't know.</p> <p>20 Q Well, you did a comparison, right, of the</p> <p>21 appearances on the website of Aquascape, its</p> <p>22 business name, as compared to The Pond Guy, right?</p> <p>23 A A search comparison, yes.</p> <p>24 Q And you came up with nine thousand versus how much?</p> <p>25 Thirteen hundred?</p>	<p style="text-align: right;">Page 85</p> <p>1 A It's typically referenced to Aquascape, the</p> <p>2 business, and Wittstock, the person.</p> <p>3 Q Well, you did come across its use as an identifier</p> <p>4 of Mr. Wittstock, like Greg Wittstock, a/k/a The</p> <p>5 Pond Guy?</p> <p>6 A I did see that.</p> <p>7 Q You saw that in more than one place, right?</p> <p>8 A In more than one place on the website?</p> <p>9 Q Yes.</p> <p>10 A I don't know about the a/k/a. But I saw it</p> <p>11 throughout the website.</p> <p>12 MR. GABRIEL: Should we break</p> <p>13 now?</p> <p>14 MS. KLIMA: Sure.</p> <p>15 (WHEREUPON A RECESS WAS HAD)</p> <p>16 Q (By Mr. Gabriel continuing): Let's continue to</p> <p>17 look at the Concluding Opinions on page 30.</p> <p>18 Bullet point two. "In Google</p> <p>19 and social media searches for the phrase The Pond</p> <p>20 Guy, Aquascape has already bumped TPG from the</p> <p>21 first position at some social media sites, and is</p> <p>22 perfectly situated to take over the first position</p> <p>23 in other searches, thus moving TPG to a lower, less</p> <p>24 advantageous position." That is one of your</p> <p>25 opinions?</p>

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<p style="text-align: right;">Page 86</p> <p>1 A Yes.</p> <p>2 Q Can you tell me if there's anything that The Pond</p> <p>3 Guy could do at this point in time to address what</p> <p>4 you opined may happen?</p> <p>5 A One more time, please.</p> <p>6 Q Is there anything The Pond Guy can do in the search</p> <p>7 optimization universe or anywhere else to address</p> <p>8 what you see as potentially happening, and that is</p> <p>9 that Aquascape could take over first position in</p> <p>10 other searches?</p> <p>11 A You mean is there a way that they could battle this</p> <p>12 out with Aquascape?</p> <p>13 Q Through search optimization or anything else.</p> <p>14 A Because of this ramp up of Aquascape in the world</p> <p>15 of social media and the fact they are appearing in</p> <p>16 the second place, I don't have any facts as to what</p> <p>17 they could do to combat that. I think it's too</p> <p>18 late for that.</p> <p>19 Q Well, if Aquascape is in second place now, how is</p> <p>20 it that it is going to be in first place?</p> <p>21 You say your opinion is that</p> <p>22 Aquascape is perfectly situated to take over the</p> <p>23 first position in other searches. I assume you are</p> <p>24 talking about social media, right?</p> <p>25 A Yeah.</p>	<p style="text-align: right;">Page 88</p> <p>1 A Or lower.</p> <p>2 Q And does that opinion that you just repeated, would</p> <p>3 that be impacted in any way, shape or form by</p> <p>4 either your further knowledge of any search engine</p> <p>5 optimization steps that The Pond Guy has taken or</p> <p>6 could take in the future?</p> <p>7 A So because I did not analyze The Pond Guy search</p> <p>8 engine optimization techniques, but I can see what</p> <p>9 the results are by looking at the search results in</p> <p>10 social media and on Google.</p> <p>11 The results are the facts.</p> <p>12 Aquascape is coming up number two in the Google</p> <p>13 search and Aquascape is coming up in first</p> <p>14 positions on various social media sites.</p> <p>15 To combat that based on The</p> <p>16 Pond Guy SEO techniques, it's most likely that they</p> <p>17 will lose that first position.</p> <p>18 Q Let me ask you something a little different about</p> <p>19 that topic.</p> <p>20 Do you provide consulting</p> <p>21 services for search engine optimization currently?</p> <p>22 A It's part of my business practice, yes.</p> <p>23 Q Is it your testimony that if The Pond Guy asked</p> <p>24 your company today is there something we can do</p> <p>25 about this in terms of search engine optimization,</p>
<p style="text-align: right;">Page 87</p> <p>1 Q Let me give you the question.</p> <p>2 The question is is there</p> <p>3 nothing The Pond Guy can do to avoid Aquascape</p> <p>4 taking over first place in the social media</p> <p>5 searches where it is now not in first place? Other</p> <p>6 than a judge saying something? I am not asking for</p> <p>7 metaphysics. I'm asking for in the universe of</p> <p>8 searching.</p> <p>9 A Because of the perfect position of Aquascape in the</p> <p>10 social media world coming up in the various social</p> <p>11 media sites under The Pond Guy on twitter at The</p> <p>12 Pond Guy, facebook pages at The Pond Guy, The Pond</p> <p>13 Guys, that perfect storm is brewing there. Also</p> <p>14 Aquascape's website optimized to show up as The</p> <p>15 Pond Guy, that is -- you can't fight that.</p> <p>16 Q It is your opinion that it is inevitable, they will</p> <p>17 be first?</p> <p>18 A If this continues the way it is going, yes, they</p> <p>19 are most likely take over first place.</p> <p>20 Q What is "if this continues"?</p> <p>21 A If the continued use of The Pond Guy by Aquascape</p> <p>22 and Wittstock continues, they will most likely take</p> <p>23 over the first place on the Google search result</p> <p>24 and bump The Pond Guy to second.</p> <p>25 Q Okay.</p>	<p style="text-align: right;">Page 89</p> <p>1 that your answer would be there's nothing you can</p> <p>2 do; they are going to be in first place?</p> <p>3 A I would first -- it probably would be a couple</p> <p>4 phased project. First phase would be to understand</p> <p>5 what your competition is doing. And it is</p> <p>6 essentially what I would do here, recognize right</p> <p>7 away that Aquascape is coming up first and second</p> <p>8 and third and is known around the Internet as The</p> <p>9 Pond Guy. My advice would be to file a lawsuit.</p> <p>10 Q That wasn't my question.</p> <p>11 The question is would you tell</p> <p>12 The Pond Guy there's nothing you can do from a</p> <p>13 search engine optimization perspective that can</p> <p>14 prevent Aquascape from reaching position number one</p> <p>15 in all social media that you've discussed?</p> <p>16 A You could give it -- you know, it would be gloves</p> <p>17 off in the mud and go do your optimizing</p> <p>18 techniques. Talk to twitter, try to get At The</p> <p>19 Pond Guy taken away at Aquascape, talk to facebook</p> <p>20 You need to regain those accounts in order to win</p> <p>21 that fight.</p> <p>22 Q I am not talking about a prohibition on use by</p> <p>23 Aquascape of The Pond Guy. I am asking whether</p> <p>24 from a search engine optimization or other</p> <p>25 techniques, would you be telling The Pond Guy</p>

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<p>1 there's nothing you can do short of getting some 2 court intervention or change in conduct by 3 Aquascape and Wittstock? 4 A I would advise my client that it is going to be a 5 very difficult task if they kept pushing me and 6 said Doug, I want to spend my money and fight the 7 good fight. 8 You know, that's their choice. 9 But as a professional opinion, I would suggest 10 doing what they are doing now. 11 Q So your report indicates -- let me ask you. 12 The analysis of positions in 13 Google search results and in the social website 14 positions is something that -- the data you got was 15 for some period of time in 2014, is that correct, 16 for all of that or did any of it go back earlier? 17 I'm not asking you to guess. 18 You're opining The Pond Guy first Google for now, 19 but maybe not later. Then you are talking about 20 position in facebook and twitter at the other ones 21 you mentioned. 22 Was the position that you're 23 calling out a position sometime in 2014? 24 A I apologize. Could you say it again? 25 Q I want to know -- it's like a baseball ranking.</p>	<p>1 Q It's 2014, correct? 2 A Yes. 3 Q You have testified that a ramp up started -- and I 4 am using your words -- suddenly, explosion, ramp 5 up. Again so I can have it in the question, what 6 is the time frame when you identify the ramp up 7 commencing? The ramp up meaning how you 8 characterize Aquascape and Wittstock's activities 9 in the social media. 10 A Sometime in 2013. 11 Q Can you tell me what was the ranking on Google and 12 facebook and twitter, all the ones where you 13 discussed the ranking in 2014, what was the ranking 14 of Aquascape and The Pond Guy in 2012? 15 A I don't know. 16 Q I take it you don't know for any year before that 17 either, is that correct? 18 A Correct. 19 Q Okay. 20 A I can look at, you know, Wittstock's own words and 21 his blog post about how, you know, the days of not 22 using the Internet are over, that was 2013, even 23 2014. It's war online right now. If you are left 24 behind, you are going to go out of business. 25 Q My question is -- that's not my question.</p>
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<p>1 Is the data who's in first 2 place and who is in second 2014 ranking, as opposed 3 to a different period of time? 4 A The percent of click through based on search result 5 position is that data is dated when the article 6 that I referred to is. 7 Q I am not referring to that. I'm referring to -- 8 I'm not being clear. I'm sorry. 9 You say for search purposes 10 currently, whenever you are writing the report, The 11 Pond Guy is in first place for Google search 12 results? 13 A Correct. 14 Q You are saying where The Pond Guy is, Aquascape, 15 for facebook, twitter, you are indicating data 16 about what place they are in, correct? 17 A Correct. 18 Q As of when? 19 A As in the date of my analysis. 20 Q Meaning sometime in 2014, you signed it on a 21 certain day? 22 A Yes. 23 Q I don't think you did all the work the day you 24 signed it? 25 A Right.</p>	<p>1 I am asking you whether you 2 have any information about the ranking on facebook, 3 Google search results, twitter, any of them as 4 between The Pond Guy and Aquascape from 2012 or 5 2011? 6 A No. 7 Q Your answer is no? 8 A That's correct. 9 Q Now, let's take 2012 before the ramp up you have 10 been testifying about. Would it make any 11 difference to your analysis if the ranking is 12 exactly the same as it is now? 13 A I would have to analyze that hypothetical. That 14 situation, I don't have an opinion on that. I 15 think the fact that the ramp up is happening is 16 important, and my testimony is that happened in 17 2013. 18 Q But you don't have any data -- 19 A I do. 20 Q -- to compare what happened -- the status of 21 ranking was before the ramp up to after, correct? 22 A We are talking about a couple different things. 23 When you are talking about ranking as it relates to 24 search engine results, no, I'm not able to go back 25 in time, you know. And I didn't. I did that in</p>

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<p>1 2014.</p> <p>2 Q For search results where you are presenting data</p> <p>3 about ranking in the results, right, first in</p> <p>4 Google for The Pond Guy with maybe not for long, et</p> <p>5 cetera, you don't have data that has allowed you to</p> <p>6 do a before and after comparison of before the ramp</p> <p>7 up here's where they ranked on social media and</p> <p>8 Google, and after here is where they are; you</p> <p>9 haven't done that comparison?</p> <p>10 A Okay. I want to separate. Let's talk about the</p> <p>11 world of Google search results and then let's talk</p> <p>12 about social media.</p> <p>13 Q Okay.</p> <p>14 A So when we are talking about Google search results,</p> <p>15 no, I don't have any data. It's just not provided.</p> <p>16 If you look at social media, you can go back in</p> <p>17 time and you can see how many posts, how many</p> <p>18 likes. You can see that there's more activity.</p> <p>19 But as it results to the</p> <p>20 actual search result, I don't have that -- I did</p> <p>21 not search in 2012 and then in 2014. But I can</p> <p>22 look at the amount of activity on those social</p> <p>23 media sites and see that there's more activity.</p> <p>24 Therefore, they would move up higher in rankings.</p> <p>25 Q But you haven't done that analysis, correct?</p>	<p>1 A It's working, yes, it is working.</p> <p>2 Q But you don't have a comparison to where it was</p> <p>3 before.</p> <p>4 A All I need to tell you is it is working right now.</p> <p>5 Q Comparatively to pre-ramp up?</p> <p>6 A I am not talking about comparatively.</p> <p>7 Q That's what I'm asking you. I know you understand</p> <p>8 my question.</p> <p>9 Let me repeat the question so</p> <p>10 you understand it clearly.</p> <p>11 I am asking you to confirm</p> <p>12 that you have not analyzed the impact on rankings</p> <p>13 of the ramp up that you are testifying to. And by</p> <p>14 rankings, I mean first on Google where The Pond Guy</p> <p>15 is. The ranking, you have a current set of</p> <p>16 rankings in your report. You testify there is a</p> <p>17 ramp up by Aquascape and Wittstock on social media.</p> <p>18 And whether that worked for</p> <p>19 ranking purposes, you don't have that analysis</p> <p>20 because you have nothing before to compare it to?</p> <p>21 A I don't need it.</p> <p>22 Q You don't need it to compare the impact on</p> <p>23 rankings?</p> <p>24 A My testimony is I did not compare rankings prior to</p> <p>25 2014. But I can tell you the results in the</p>
Page 95	Page 97
<p>1 A I have just looked at the social media posts,</p> <p>2 likes, tweets, activity. I have analyzed that</p> <p>3 throughout the years.</p> <p>4 Q But not the ranking in the social meeting prior to</p> <p>5 2014?</p> <p>6 A I did not do a search result comparison other than</p> <p>7 the date of my report.</p> <p>8 Q So would you agree with me that you haven't</p> <p>9 analyzed the impact on rankings of the ramp up that</p> <p>10 you have been testifying about and that you discuss</p> <p>11 in your opinion?</p> <p>12 A I analyzed the amount of activity that was done on</p> <p>13 social media, and, you know, the push for more</p> <p>14 Internet-related activity by Mr. Wittstock.</p> <p>15 Q Okay.</p> <p>16 A Because of that activity, one should -- a site</p> <p>17 should come up higher in the search results.</p> <p>18 The only thing I can base it</p> <p>19 on is facts, SEO best practices, facebook best</p> <p>20 practices, YouTube best practices. Here is what</p> <p>21 you do so you appear up top. Aquascape is doing</p> <p>22 that.</p> <p>23 Q But --</p> <p>24 A That is my analysis.</p> <p>25 Q But you don't know if it worked, right?</p>	<p>1 rankings is due to the activity, the amount of</p> <p>2 activity, which is a lot, which is ramped up,</p> <p>3 that's happening now with Aquascape.</p> <p>4 Q What about whether there was a change in the</p> <p>5 results of 2012, you can't tell me anything about</p> <p>6 if there was one, let alone what it's attributable</p> <p>7 to?</p> <p>8 A I can tell you, only talking social media side, you</p> <p>9 can see there's a lot more activity on social</p> <p>10 media. But you might not understand how all this</p> <p>11 works. I could get into some more details.</p> <p>12 But the more activity and the</p> <p>13 more tweets you do and the more people that like</p> <p>14 the tweet and retweet it or if you do a facebook</p> <p>15 post, you do more of them and more people like them</p> <p>16 and share them, all that activity goes viral.</p> <p>17 Therefore, your rankings go up.</p> <p>18 Q You're telling me the elements should give you a</p> <p>19 higher ranking?</p> <p>20 A The amount of activity, yes.</p> <p>21 Q You're concluding the amount of activity went up,</p> <p>22 so the rankings must have changed between 2012 and</p> <p>23 2014?</p> <p>24 A I'm saying that due to the fact that there is a lot</p> <p>25 more activity on social media, that their rankings</p>

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<p style="text-align: right;">Page 98</p> <p>1 are high.</p> <p>2 Q But you can't opine whether they are higher than</p> <p>3 they were because you just don't know what they</p> <p>4 were?</p> <p>5 A I don't know the exact number, but I can tell you</p> <p>6 that the fact that they are doing more in the</p> <p>7 social media space, that assists them to rank</p> <p>8 higher.</p> <p>9 Q I think you said a couple things about conversion</p> <p>10 rates. What do you mean by that?</p> <p>11 A What did I say?</p> <p>12 Q You made comments about clicks and clicks convert</p> <p>13 to sales. I mean is that something that has</p> <p>14 anything to do with what you're reporting on?</p> <p>15 A Well, I was not provided the Google Analytics for</p> <p>16 Aquascape.</p> <p>17 If you look at Aquascape's</p> <p>18 code, you have Google Analytics installed. I was</p> <p>19 not given that access. So therefore, I cannot talk</p> <p>20 about how much traffic is going to Aquascape.com</p> <p>21 due to the search of The Pond Guy. I don't know</p> <p>22 their conversion rates. I don't know their profit</p> <p>23 margins.</p> <p>24 Q Okay.</p> <p>25 A But the first step is to get into the Google</p>	<p style="text-align: right;">Page 100</p> <p>1 Do you have any information</p> <p>2 about TPG's use of social media and whether it has</p> <p>3 created a growing volume of posts, messages, images</p> <p>4 and other content?</p> <p>5 A No.</p> <p>6 Q Do you have any information that allows you to</p> <p>7 opine that Aquascape's use of the phrase The Pond</p> <p>8 Guy has increased its sales?</p> <p>9 I am distinguishing that from</p> <p>10 your first conclusion on page 30 where you say</p> <p>11 Aquascape is strategically using the phrase The</p> <p>12 Pond Guy which leads to more website traffic and</p> <p>13 potentially increased sales.</p> <p>14 I am trying to understand your</p> <p>15 opinion. It says what it says, but the activities</p> <p>16 could potentially increase sales.</p> <p>17 Do you have any information</p> <p>18 that the use of The Pond Guy by Aquascape has</p> <p>19 increased its sales?</p> <p>20 A No, I don't.</p> <p>21 Q The other part of that conclusion says likely at</p> <p>22 the expense of TPG's website traffic and sales.</p> <p>23 Again, you don't have any</p> <p>24 evidence, since you can't opine that the web</p> <p>25 activities using The Pond Guy of Aquascape have</p>
<p style="text-align: right;">Page 99</p> <p>1 Analytics and understand what traffic is going to</p> <p>2 their site and why. I was not given that</p> <p>3 information. I asked for it; did not receive it.</p> <p>4 Q Can you tell me --</p> <p>5 MS. KLIMA: For the record, we</p> <p>6 have asked for it and not received it.</p> <p>7 Q (By Mr. Gabriel continuing): Can you tell me</p> <p>8 anything about conversion rates as it relates to</p> <p>9 facebook or twitter?</p> <p>10 A I can tell you in a general sense that businesses</p> <p>11 use these social media tools to, you know, get</p> <p>12 people to go to to their website and purchase their</p> <p>13 products. You know, each company varies as it</p> <p>14 relates to what their conversion rates and profit</p> <p>15 margins are.</p> <p>16 Q Nothing specific as it relates to the companies in</p> <p>17 this case, correct, in terms of conversion rates</p> <p>18 from facebook?</p> <p>19 A I have not analyzed those conversion rates.</p> <p>20 Q Let me ask you to look at page 26 for a minute in</p> <p>21 your report. This is all Exhibit 5.</p> <p>22 At the very last paragraph the</p> <p>23 first sentence says, "Aquascape and Wittstock's use</p> <p>24 of social media has created a growing volume of</p> <p>25 posts, messages, images and other content."</p>	<p style="text-align: right;">Page 101</p> <p>1 increased its sales, I take it you can't opine that</p> <p>2 any such sales would likely be at the expense of</p> <p>3 The Pond Guys website and its sales, right?</p> <p>4 A I don't have an opinion on that right now.</p> <p>5 Q You don't have any information about whether</p> <p>6 there's any overlap whatsoever between customers</p> <p>7 who purchase products or services from The Pond Guy</p> <p>8 and the customers who purchase products or services</p> <p>9 from Aquascape, is that correct?</p> <p>10 A I'm not saying I'm a pond expert. But both</p> <p>11 businesses are in the same business, selling pond</p> <p>12 supplies.</p> <p>13 Q But the answer to my question is you don't know if</p> <p>14 they have any of the same customers, right?</p> <p>15 A I don't know if they have the exact -- if they both</p> <p>16 have the same customers. I don't know.</p> <p>17 Q When you say they are in the same business --</p> <p>18 MR. GABRIEL: Can we have the</p> <p>19 answer read back?</p> <p>20 (WHEREUPON THE LAST ANSWER WAS</p> <p>21 READ BACK BY THE COURT REPORTER)</p> <p>22 MR. GABRIEL: Let's take five</p> <p>23 minutes.</p> <p>24 (WHEREUPON A RECESS WAS HAD)</p> <p>25 Q (By Mr. Gabriel continuing): Have you ever heard</p>

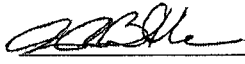

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<p style="text-align: right;">Page 102</p> <p>1 of Alexa.com?</p> <p>2 A Yes.</p> <p>3 Q Can you tell me what that is?</p> <p>4 A Alexa.com is a -- I believe it is a site -- it</p> <p>5 ranks websites compared to other websites.</p> <p>6 Q Have you had occasion to use it in any way in any</p> <p>7 work that you do?</p> <p>8 A Not that I recall. But I have used Alexa looking</p> <p>9 at how Alexa ranks a website in the world wide web.</p> <p>10 Q I mean do you have any opinion about whether it</p> <p>11 provides useful information? I am trying to find</p> <p>12 out what you think of it one way or another.</p> <p>13 A I don't. I think in the right context it could,</p> <p>14 the ranking of the site compared to another</p> <p>15 possibly.</p> <p>16 Q Did you look at that at all in connection with this</p> <p>17 particular work on this case?</p> <p>18 A Not that I recall.</p> <p>19 Q Have you completed your work on this matter to</p> <p>20 date?</p> <p>21 A To date, yes.</p> <p>22 Q Have you been asked to do any additional work?</p> <p>23 A I have not.</p> <p>24 MR. GABRIEL: No further</p> <p>25 questions.</p>	<p style="text-align: right;">Page 104</p> <p>1 social media and Internet by Aquascape as compared</p> <p>2 to any other reason or cause for either increased</p> <p>3 or decreased sales?</p> <p>4 A You know, at this point without digging in, I don't</p> <p>5 have an opinion on that.</p> <p>6 Q Do you have any methodologies that you used in the</p> <p>7 past as a consultant or expert where you were</p> <p>8 examining the use of a trademark on the Internet</p> <p>9 and tried to determine the impact, if any, it had</p> <p>10 on the sales of the product or services of the</p> <p>11 company using that Mark?</p> <p>12 A Yes.</p> <p>13 Q What methodologies have you used?</p> <p>14 A The first step in that example -- I would like at</p> <p>15 the Google Analytics and determine what traffic is</p> <p>16 being driven to the Aquascape website from somebody</p> <p>17 using the term The Pond Guy or Pond Guy.</p> <p>18 Q Okay. You said that is the first step?</p> <p>19 A Yes.</p> <p>20 Q And then?</p> <p>21 A Then I don't know where I would go from there, but</p> <p>22 I would definitely learn a lot from that.</p> <p>23 Q You do something with that information but right</p> <p>24 now you can't articulate exactly what it would be</p> <p>25 that you would do?</p>
<p style="text-align: right;">Page 103</p> <p>1 EXAMINATION</p> <p>2 BY MS. KLIMA:</p> <p>3 Q I just have a couple questions. This may already</p> <p>4 be on the record, but I want to make sure it is</p> <p>5 clear.</p> <p>6 Do you currently have the</p> <p>7 information you need to give an opinion on the</p> <p>8 actual impact of Aquascape's increased activity on</p> <p>9 sales?</p> <p>10 A No. Was the question do I have?</p> <p>11 Q Do you currently have all the information you would</p> <p>12 need?</p> <p>13 A No.</p> <p>14 Q What information would you need?</p> <p>15 A I would need, as I mentioned, the Google Analytics.</p> <p>16 I would need sales records. I would need, you</p> <p>17 know, conversion rates, profit margins.</p> <p>18 MS. KLIMA: Thank you very</p> <p>19 much.</p> <p>20 RE-EXAMINATION</p> <p>21 BY MR. GABRIEL:</p> <p>22 Q I have some questions about that.</p> <p>23 How would you go about it, if</p> <p>24 you had all the information you just identified,</p> <p>25 attribute sales to the use of The Pond Guy on the</p>	<p style="text-align: right;">Page 105</p> <p>1 A Yes. For an example, you could follow the --</p> <p>2 someone hits the website. And based on that search</p> <p>3 term, where did they go. Look at the traffic</p> <p>4 patterns.</p> <p>5 Q Have you done analyses like the one you are talking</p> <p>6 about before?</p> <p>7 A Yes.</p> <p>8 Q Ultimately did you get to the issue of somebody</p> <p>9 came to the website based upon using a certain</p> <p>10 search term and they purchased on that visit, have</p> <p>11 you addressed the issue of how do you attribute</p> <p>12 whether the sale was caused by or related to how</p> <p>13 the person got to the website as opposed to the</p> <p>14 product being sold, the reputation of the business,</p> <p>15 have you addressed that type of analysis?</p> <p>16 A I have.</p> <p>17 Q In what context have you addressed it?</p> <p>18 A I would call that an apportionment analysis. So I</p> <p>19 would apportion typically -- I would be looking at</p> <p>20 profits, what percent of the profit is due to the</p> <p>21 use of that phrase.</p> <p>22 I could, you know, on the</p> <p>23 unjust enrichment side of it, go that way. Then on</p> <p>24 the other side, the lost profit side, that is a</p> <p>25 lost sale to the other company.</p>

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<p style="text-align: right;">Page 106</p> <p>1 Q Did you do that analysis in any of the cases that</p> <p>2 are listed in your report as your experience that</p> <p>3 we talked about this morning?</p> <p>4 A On the cases this morning, I did not -- I did list</p> <p>5 -- I did -- let's think about that.</p> <p>6 Q Just so the question is precise, you understand</p> <p>7 what I am asking, right, which is have you done</p> <p>8 what you just described, which is you look at a</p> <p>9 phrase or Mark, follow through with did people --</p> <p>10 the metrics of getting to the website and then do</p> <p>11 the apportionment analysis.</p> <p>12 Have you done that which you</p> <p>13 described which you said you have done in the past</p> <p>14 have you done that in any of the cases on the list,</p> <p>15 Mr. Bania?</p> <p>16 A Two answers to this.</p> <p>17 As it relates to the Internet</p> <p>18 related clients I told you about, I did look at the</p> <p>19 unjust enrichment. I did not receive the financial</p> <p>20 information to look into lost profits.</p> <p>21 Other cases that I have here</p> <p>22 deal with copyright infringement in the apparel</p> <p>23 industry. There is an apportionment analysis</p> <p>24 there. I don't know if you want to hear about</p> <p>25 that?</p>	<p style="text-align: right;">Page 108</p> <p>1 CERTIFICATE</p> <p>2 STATE OF MICHIGAN</p> <p>3 COUNTY OF OAKLAND</p> <p>4</p> <p>5 I, Ann Marie Myers-Boothe, a Notary</p> <p>6 Public in and for the above county and state, do hereby</p> <p>7 certify that this deposition was taken before me at the</p> <p>8 time and place hereinbefore set forth; that the witness</p> <p>9 was by me first duly sworn to testify to the truth; that</p> <p>10 this is the true, full and correct transcript of my</p> <p>11 stenographic notes so taken; and that I am not related,</p> <p>12 nor of counsel to either party, nor interested in the</p> <p>13 event of this cause.</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19  </p> <p>20 ANN MARIE MYERS-BOOHE, C.S.R.-5543</p> <p>21 Notary Public, Oakland County, Michigan,</p> <p>22 My Commission Expires: 01-10-17</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 107</p> <p>1 Q No, I don't need to hear about that.</p> <p>2 MR. GABRIEL: No further</p> <p>3 questions.</p> <p>4 MS. KLIMA: Nothing. Thank</p> <p>5 you very much.</p> <p>6 (WHEREUPON DEPOSITION CONCLUDED AT</p> <p>7 APPROXIMATELY 12:22 P.M.)</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	

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